

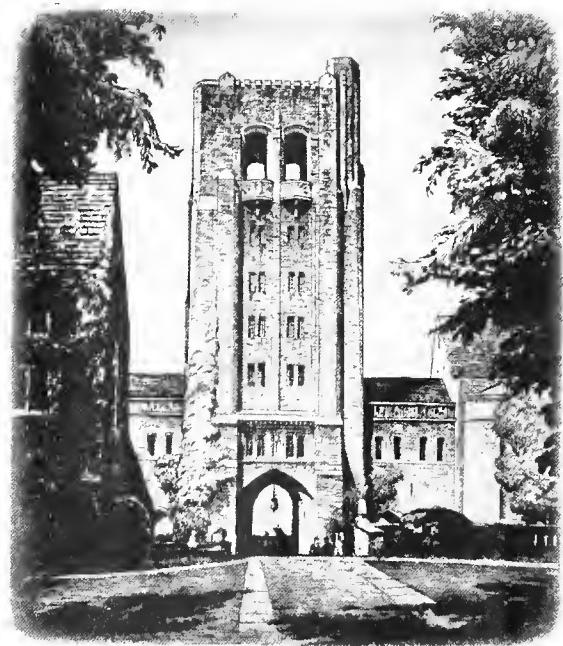


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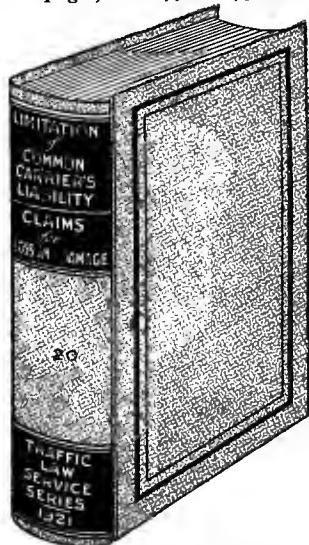
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This work is dedicated  
to the Memory of My Deceased Brother,  
**Frederick George Barnes, L. L. B.**

whose sterling character, kind and lovable disposition, and sincerity as a friend endeared him to all with whom he came in contact. His preparation for life prepared him for an untimely death. The inscription of this work is but a slight memorial of the author's affection for a beloved brother, whose exemplary life has ever been an inspiration to him in his work. "*Quos virtus coniungit, mors non potest dividere.*"

## PREFACE

"FREIGHT RATES AND CHARGES" treats of the laws, rules and regulations governing the construction, operation and development of railroad freight rates and charges in their application to interstate and foreign commerce. It covers all questions involving the legal status of different kinds of rates and their usage, the establishment of rates, changes in rates, quotation of rates, assessment of rates, payment for transportation, factors and elements in rate-making, justness and reasonableness of rates, comparison of rates, advances and reductions in rates, maintenance of rates, investigation and suspension of new rates, jurisdiction of Interstate Commerce Commission, and many other kindred subjects of vital interest.

The purpose of the work is to state the present law governing every proposition involving freight rates and charges in a manner that is readily understandable in its application to everyday problems. Toward the accomplishment of this object, great care has been exercised in the production of a comprehensive Analysis, a lucid and authoritative Subject-Matter with copious notes and complete citation of cases, a detailed Index, and a complete Table of Cases.

The original unique and color scheme of the work afford maximum accessibility. For differentiation purposes, the Analysis is printed on pink paper, the Subject-Matter on white paper, the Index on green paper, and the Table of Cases on yellow paper.

The freight rate is the most potent factor in interstate and foreign commerce, and the principles governing it constitute one of the most complex subjects in American jurisprudence. In the production of the manuscript of this book, the most extensive and profound research work was necessitated by reason of the fact that the evolution of the subject during recent years has resulted in a state of chaos. The Transportation Act of February 28, 1920, effected quite a number of revolutionary changes.

A critical examination of this work will disclose the fact that it is more than a digest of decisions, as especial care has been taken to state the current law on every proposition in an elucidative and orderly manner, together with full citation of authorities, thus making instantly available the principles of law which govern and control this all-important subject.

The work analyzes each case from its inception before the Interstate Commerce Commission, or trial court, to its disposition by the United States Supreme Court, or other appellate authority. All statutory provisions governing the subject are fully treated of throughout the work.

One of the most important decisions of the United States Supreme Court, construing the Transportation Act of February 28, 1920, is that of *Railroad Commission of Wisconsin v. Chicago, B. & Q. Rd. Co.* (Decided February 27, 1922), involving the power of the Interstate Commerce Commission, in order to remove a discrimination against interstate commerce involved in a general disparity between interstate and intrastate passenger rates of interstate carriers, to raise the intrastate rates to correspond with the interstate rates. The following elucidative statement by Mr. Chief Justice Taft in the above case clearly shows that in the Transportation Act of 1920 Congress by legislative fiat conferred power upon the Interstate Commerce Commission to deal *directly* with intrastate rates where they are unduly discriminating against interstate commerce—a power theretofore *indirectly exercised as to persons and localities* by virtue of judicial interpretation of Section 2 of the Act to Regulate Commerce in the *Shreveport* and other cases:

"The Interstate Commerce Act of 1887, 24 St. 379, was enacted by Congress to prevent interstate railroad carriers from charging unreasonable rates and from unjustly discriminating between persons and localities. The railroads availed themselves of the weakness and cumbersome

machinery of the original law to defeat its purpose, and this led to various amendments culminating in the amending Act of 1910, 36 St. L. 539, in which the authority of the Commission in dealing with the carriers was made summary and effectively complete. Whatever the causes, the fact was that the carrying capacity of the railroads did not thereafter develop proportionately with the growth of the country, and it became difficult for them to secure additional investment of capital on feasible terms. When the extraordinary demand for transportation arose in 1917, the Congress and the President concluded to take over all the railroads into the management of the Federal Government, and by joint use of facilities, which the Anti Trust Law was thought to forbid under private management and by use of Government credit, to increase their effectiveness. This was done by appropriate legislation and executive action under the war power. From January 1, 1918, until March 1, 1920, when the Transportation Act went into effect, the common carriers by steam railroad of the country were operated by the Federal Government. Due to the rapid rise in the prices of material and labor in 1918 and 1919, the expense of their operation had enormously increased by the time it was proposed to return the railroads to their owners. The owners insisted that their properties could not be turned back to them by the Government for useful operation without provision to aid them to meet a situation in which they were likely to face a demoralizing lack of credit and income. Congress acquiesced in this view. The Transportation Act of 1920 was the result. It was adopted after elaborate investigations by the Interstate Commerce Committees of the two Houses.

"Under Title II it made provision for the termination of federal control March 1, 1920, for the refunding of the carriers' indebtedness to the United States, and for a guaranty for six months to the carriers of an income equal to the war-time rental for their properties, and directed that for two years following the termination of federal control, the Secretary of the Treasury, upon certificate of the Commission might make loans to the carriers not exceeding the maximum amount recommended in the certificate, out of a revolving fund of \$300,000,000.

"Under Title IV, amendments were made to the Interstate Commerce Act which included section 13, paragraph 3 and 4, and section 15a. *The former for the first time authorized the Commission to deal directly with intrastate rates where they are unduly discriminating against interstate commerce—a power already indirectly exercised as to persons and localities, with approval of this Court in the Shreveport and other cases.* The latter, the most novel and most important feature of the act, requires the Commission so to prescribe rates as to enable the carriers as a whole or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of the railway property used in transportation. For two years, the return is to be 5½ per cent., with ½ per cent. for improvements, and thereafter is to be fixed by the Commission.

"The act sought to avoid excessive incomes accruing, under the operation of section 15a, to the carriers better circumstanced by using the excess for loans to the others and for other purposes. The act further put under the control of the Interstate Commerce Commission, 1st, the issuing of future railroad securities by the interstate carriers; 2nd, the regulation of their car supply and distribution and the joint use of terminals; and 3rd, their construction of new lines, and their abandonment of old lines. The validity of some of these provisions has been questioned. Upon that we express no opinion. We only refer to them to show the scope of the congressional purpose in the act.

"It is manifest from this very condensed recital that the act made a new departure. *Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates.* The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix

*rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in section 15a to be one of the purposes of the bill.*

"Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. Twenty per cent. of the gross freight receipts of the railroads of the country are from intrastate traffic, and fifty per cent. of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three.

If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. Section 15a confers no power on the Commission to deal with intrastate rates. What is done under that section is to be done by the commission 'in the exercise of its powers to prescribe just and reasonable rates', i. e., powers derived from previous amendments to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates. *When we turn to par. 4, section 13, however, and find the Commission for the first time vested with a direct power to remove 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce', it is impossible to escape the dovetail relation between that provision and the purpose of section 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an 'undue, unreasonable, and unjust discrimination against interstate or foreign commerce', within the ordinary meaning of those words.*

\* \* \* \* \*

*"It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce."*

In this work all captions and sub-captions are stated in technical language, and each proposition of law should be read with particular reference to the heading. It is also suggested that the authority citations and notes appended to each proposition be thoroughly considered, inasmuch as they contain valuable explanatory statements and guiding information. Liberal use should be made of the Index, Table of Cases and Analysis, and in using the Index its splendid system of cross-indexing should be employed.

This work is printed verbatim from Chapter 6 of Loose-Leaf TRAFFIC LAW SERVICE, the manuscript of which was produced at a great expenditure of professional time and money. In offering this work to the public in bound form, at a modest price, it is with the desire that the information contained therein may be disseminated as widely as possible in the hope that it may prove of some assistance to the transportation world generally.

## ABBREVIATIONS AND TERMS

### KEY TO CITATION REPORTS

Abb. U. S.	Abbott, U. S. Circuit and District Courts, 1865-71.
Am. Law Reg.	American Law Register, (O. S.) Old Series, (N. S.) New Series.
App. D. C.	Appeal Cases, (D. C.)
Atl.	Atlantic Reporter.
Bee	Bee, (U. S.)
Ben.	Benedict, U. S.)
Biss.	Bissell, (U. S.)
Black	Black, (U. S.)
Blatchf.	Blatchford, (U. S.)
Bond	Bond, (U. S.)
C. C. A.	United States Circuit Court of Appeals, from 1892.
Cliff.	Clifford, (U. S.)
Conf. Rul. Bul.	Conference Rulings Bulletin of the Interstate Commerce Commission.
Cranch	Cranch, (U. S.)
Ct. Cl.	Court of Claims, (U. S.)
Curt.	Curtis, (U. S.)
Dall.	Dallas, (U. S.)
Deady	Deady, (U. S.)
Fed. Cas.	Federal Cases, (U. S.)
Fed. Rep.	Federal Reporter, United States Circuit and District Courts from 1880 and all of the Circuit Courts of Appeals from their organization.
Flip.	Flippin, (U. S.)
Holmes	Holmes, (U. S.)
How.	Howard, (U. S.)
Hughes	Hughes, (U. S.)
I. C. C. Rep.	Interstate Commerce Commission Reports.
I. C. Rep.	Interstate Commerce Reports.
In. Rev. Rec.	Internal Revenue Record, New York, from 1865.
Johns., (N.Y.)	Johnson, New York Supreme Court, etc., 1806-23.
L. Ed.	United States Supreme Court Reports, Lawyers' Edition.
L. R. A.	Lawyers' Reports, Annotated.
Mason	Mason, (U. S.)
McAll.	McAllister, (U. S.)
McLean	McLean, (U. S.)
N. C. C. A.	Negligence and Corporation Cases Annotated.
Newb. Adm.	Newberry, U. S. District Courts in Admiralty, 1842-57.
N. E.	Northeastern Reporter.
N. W.	Northwestern Reporter.
N. Y. Leg. Obs.	The New York Legal Observer, 1842-54.
N. Y. Supp.	New York Supplement Reporter.
Olcott	Olcott, (U. S.)
Otto	Otto, (U. S.)
Pac.	Pacific Reporter.
Paine	Paine, (U. S.)
Pet.	Peters, (U. S.)
Sawy.	Sawyer, (U. S.)
S. E.	Southeastern Reporter.
Sou.	Southern Reporter.
S. W.	Southwestern Reporter.
Story	Story, (U. S.)
Sup. Ct. Rep.	United States Supreme Court Reporter.
Tar. Cir.	Tariff Circular of the Interstate Commerce Commission.
U. S.	United States Supreme Court, from 1791. So cited from 1875. See Dall., Cranch, Wheat., Pet., Black, Wall. and Otto.
U. S. App.	United States Appeals.
U. S. C. C.	United States Circuit Court.
U. S. C. C. A.	United States Circuit Court of Appeals.
U. S. D. C.	United States District Court.
Wall, Jr.	Wallace, Junior, (U. S.)
Wall, Sr.	Wallace, Senior, (U. S.)
Ware	Ware, (U. S.)
Wheat.	Wheaton, (U. S.)
Woods	Woods, (U. S.)

### GLOSSARY

Ab initio	From the beginning.
Ad valorem	According to the value, <i>e. g.</i> , a duty or tax.
A fortiori	By so much the stronger; all the more.
Aliunde	From elsewhere, from another source, <i>e. g.</i> , <i>proof aliunde</i> .
Amicus curiae	A friend of the court. One who, for the assistance of the court, gives information of some matter of law in regard to which the court is doubtful or mistaken. This is usually done by filing a brief in the cause.
Ante	Before. This word refers to a previous part of the work outside of the section in which it occurs.
A posteriori	See "Argument."
A priori	See "Argument."
Argument	Argument is divided into ( <i>a</i> ) <i>a priori</i> , from the antecedent or cause to the generally understood consequent or effect; and so in ordinary parlance <i>a priori</i> means "at first sight;" ( <i>b</i> ) <i>a posteriori</i> , from the consequent or effect to the antecedent, or cause.

Bona fide	In good faith; honestly; without fraud or unfair dealing.
Causa proxima, non remota	The immediate, not the remote cause is to be regarded.
spectatur	To be more fully informed. An original writ or action whereby a cause is removed from an inferior to a superior court for trial. The record of the proceedings is then transmitted to the Superior Court.
C contra	Against; contrary to.
De minimis non curat lex	The law takes no account of trifles.
De novo	Anew; afresh.
Dictum	Or <i>obiter dictum</i> . The expression by a judge of an opinion on a point of law arising during the hearing of a case, which, however, is not necessary for the decision of that case. A <i>dictum</i> is not, therefore, binding on other judges.
Eo nomine	By that name; of itself.
Et al.	<i>Et alius</i> ; and others. This term appearing as a suffix to the name of the plaintiff or defendant in a case signifies that there are other parties to the suit not appearing in the style of same.
Et. seq.	<i>Et sequitur</i> ; refers to consecutive numbers immediately following.
Ex contractu	Actions <i>ex contractu</i> ; those which arise out of contract.
Ex delicto	Actions <i>ex delicto</i> , those which arise out of the tort or default of the defendant.
Ex gratia	As a matter of favor.
Ex officio	By virtue of his office.
Ex parte	Of the one part. An action is <i>c. r. parte</i> when it is not an adverse proceeding against any one else.
Ex post facto	Made after the occurrence; <i>e. g.</i> , legislation which has, or would have if passed, a retrospective application.
Ex rel.	<i>Ex relatione</i> : on the relation or information.
Haec verba	In the exact language; word for word; verbatim.
Ibid	<i>Ibidem</i> ; the same; <i>e. g.</i> , the same volume, case or citation immediately preceding.
Ignorantia juris, quod quisque scire tenetur, non excusat	Ignorance of the law, of which everyone is presumed to know, excuses not.
Infra	Below. This work refers to subsequent matter in the same section.
In limine	At the outset.
In loco parentis	In place of a parent.
In re	In the matter of; used in entitling matters in court other than actions between adverse parties.
In rem	Against the thing; actions <i>in rem</i> are against a thing as distinguished from actions <i>in personam</i> (against a person).
Inter alia	Among other things.
Inter partes	Between the parties.
Inter sese	Among themselves.
In toto	In the whole; altogether.
In transitu	In transit, or removal from one place to another.
Ipsissimis verbis	In the identical words—as opposed to <i>substantially</i> .
Ipsò facto	By the very act itself, <i>i. e.</i> , as the necessary consequence of the act.
Mutatis-mutandis	Means, "with the necessary changes in points of detail."
Nunc pro tunc	A proceeding taken, judgment declared, etc., <i>now for then</i> . Where a proceeding, etc., has been delayed by the action of the court or Commission, or any like ground, the tribunal may allow it to be dated as if it had taken place or been delivered on the earliest date.
Obiter dictum	A saying by the way. An opinion of a judge, not necessary to the judgment given of record, and consequently of less authority.
Onus probandi	Burden of proof.
Pari materia	In the same matter; on the same subject.
Particeps criminis	A partner in crime.
Pendente lite	While the suit is pending.
Per contra	On the other hand.
Per curiam	By the court.
Per diem	By the day.
Per se	By itself; in and of itself.
Post	After. This word refers to a subsequent part of the work outside of the section in which it occurs.
Pro rata	In proportion.
Pro tanto	For so much; to that extent.
Quaere	Inquire; meaning that the question or proposition, to which the word is appended, is a doubtful one.
Quantum meruit	As much as he has earned. A form of action brought by one party to a contract against the other, not founded on the contract itself, but on an implied promise to pay for so much as the party suing has done. If one party refuses to perform his part, the other may rescind and sue on a quantum meruit.
Res	A thing, or things.
Res ipsa loquitur	A phrase often used in actions for injury by negligence where no proof of negligence is required beyond the accident itself, which is such as necessarily to involve negligence.
Res judicata	A point already judicially decided; it is conclusive until the judgment is reversed.
Sub silentio	In silence.
Sui Juris	Of his own right. A person who is neither a minor nor insane, nor subject to any other disability, is said to be <i>sui juris</i> , <i>i. e.</i> , able to make contracts and act in his own right.
Status quo	The existing state of things at any given date. To leave in <i>statu quo</i> , is to leave unaltered.
Supra	Above. This word refers to preceding matter in the same section.
Ultra vires	Beyond their powers.
Via	By way of.
Vis major	Irresistible force; inevitable accident.

**CHAPTER 6.**  
**(Sections 600-699.)**

**FREIGHT RATES AND CHARGES.**

**ANALYSIS.**

SECTION	SYNOPSIS OF SUBJECT-MATTER.
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**600. Different kinds of freight rates defined and their usage.**

- A. LOCAL RATES.
- B. JOINT RATES.
- C. THROUGH RATES.
- D. PROPORTIONAL RATES.
- E. ARBITRARIES.
- F. DIFFERENTIALS.
- G. CLASS RATES.
- H. COMMODITY RATES.
- I. RATES FOR MIXED SHIPMENTS.
- J. RAIL-AND-WATER RATES.
- K. "PAPER" RATES.
- L. "MISSIONARY" RATES.

**601. Joint rates.**

- A. A JOINT RATE IS A MATTER OF AGREEMENT BETWEEN CONNECTING CARRIERS.
- B. JOINT THROUGH RATES TO AND FROM PORTO RICAN PORTS.
- C. A CARRIER MAY NOT DENY THE BENEFIT OF A JOINT RATE TO MANUFACTURERS ON CONNECTING LINES IN ORDER TO FOSTER INDUSTRIES ON ITS OWN LINE.
- D. PARTIES WHO ARE NOT COMPETENT IN LAW TO ESTABLISH JOINT RATES FOR INTERSTATE TRANSPORTATION.
- E. A JOINT RATE ESTABLISHED VIA ONE ROUTE IS NOT APPLICABLE TO PROPERTY TRANSPORTED VIA ANOTHER ROUTE.
- F. LEGAL STATUS OF A JOINT THROUGH RATE THAT EXCEEDS THE AGGREGATE OF INTERMEDIATE RATES.
- G. LEGAL STATUS OF A JOINT RATE THAT IS LOWER THAN THE COMBINATION OF LOCAL RATES.
- H. LEGAL STATUS OF TARIFF CARRYING A JOINT RATE WHICH DOES NOT NAME A JUNCTION POINT.
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- N. JOINT RATES TO AND FROM FOREIGN COUNTRIES.
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- B. THE LEGAL RATE APPLICABLE TO AN INTERSTATE SHIPMENT IS THE PUBLISHED THROUGH RATE IN EFFECT AT THE TIME THE SHIPMENT IS RECEIVED BY THE CARRIER FOR TRANSPORTATION AND OVER THE ROUTE WHICH IT IS TO MOVE.
- C. CARRIERS MAY SPECIFY BASING POINTS OR FACTORS FOR CONSTRUCTING COMBINATION RATE.
- D. RATE TO APPLY IN THE ABSENCE OF A JOINT RATE OR A SPECIFIC METHOD OF CONSTRUCTING THROUGH RATE.
- E. RIGHT OF A SHIPPER TO CONSIGN INTERSTATE TRAFFIC TO AN INTERMEDIATE POINT, ASSUME CUSTODY OF THE SHIPMENT, EITHER ACTUAL OR CONSTRUCTIVE, AND THEN REBILL THE SAME TO DESTINATION, WHERE THE JOINT THROUGH INTERSTATE RATE IS HIGHER THAN THE AGGREGATE OF THE INTERMEDIATE RATES.
- F. COMBINATION OF JOINT RATE TO COMMON POINT AND LOCAL RATE BEYOND.
- G. RATES THAT ARE NOT ON FILE WITH THE INTERSTATE COMMERCE COMMISSION ARE NOT LAWFUL FACTORS IN CONSTRUCTING THROUGH INTERSTATE RATES.
- H. INTER-CLASSIFICATION TERRITORIES RATES AND INTER-RATE TERRITORIES RATES.
- I. A SHIPPER IS NOT CONCERNED WITH THE DIVISIONS OF A THROUGH RATE.
- J. A THROUGH ROUTE MAY NOT BE DIVIDED INTO DIVISIONS FOR RATE-MAKING PURPOSES.
- K. COMMODITY RATES SHOULD BE STATED THROUGH FROM POINT OF ORIGIN TO DESTINATION.
- L. REASONABLENESS OF THROUGH RATE COMPOSED OF AGGREGATE OF INTERMEDIATE RATES.
- M. RATES BETWEEN POINTS IN THE UNITED STATES AND ADJACENT FOREIGN COUNTRIES.
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**603. Establishment of freight rates.**

- A. DUTY OF CARRIERS TO INITIATE RATES.
- B. WHEN AN INTERSTATE FREIGHT RATE IS ESTABLISHED.

- C. THE SHIPPER HAS A CONTRACT RIGHT IN THE PUBLISHED RATE.
- D. RATES ARE NOT NULLIFIED BY THE FAILURE OF THE CARRIERS TO AGREE UPON THE DIVISIONS THEREOF.
- E. PRESUMPTION THAT CARRIER ACTED IN GOOD FAITH IN INITIATING RATES.
- F. "PAPER" RATES.
- G. RULES FOR DISPOSITION OF FRACTIONS IN PUBLICATION OF RATES.
- H. EFFECTIVE DATE OF NEW RATES AND SUBSEQUENT ADJUSTMENTS UNDER INCREASED RATES, 1920, COVERED BY EX PARTE 74.
- I. STATUS OF PRE-WAR INTRASTATE RATES AFTER TERMINATION OF FEDERAL CONTROL.

**604. Changes in freight rates by carriers.**

- A. RIGHT OF THE CARRIER TO CHANGE ITS RATES.
- B. NO PRESUMPTION OF WRONG ARISES FROM A CHANGE IN RATES BY THE CARRIER.
- C. RATES IN EFFECT ON FEBRUARY 29, 1920, TO CONTINUE IN EFFECT UNTIL CHANGED BY GOVERNMENTAL AUTHORITY.
- D. REDUCTIONS IN RATES UNTIL SEPTEMBER 1, 1920, FORBIDDEN, UNLESS APPROVED BY INTERSTATE COMMERCE COMMISSION.

**605. Quotation of freight rates by carriers to shippers.**

- A. DUTY OF CARRIERS TO QUOTE RATES TO SHIPPERS.
- B. QUOTATION ON SHIPPER'S APPLICATION OF RATE FOR SAILING, AND OTHER ACCRUING CHARGES.
- C. MISQUOTATION OF RATE BY AGENT DOES NOT AFFORD LAWFUL CHARGE.
- D. COMMISSION'S RATES TREATED AS EMBODIED IN STATUTE.

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- A. COLLECTION OF ESTABLISHED RATE ON SHIPMENT RECALLED BY THE SHIPPER.
- B. OUTBOUND CHARGES ON A SHIPMENT MAY NOT BE REFUNDED BY THE CARRIER AND CHARGED BACK AGAINST THE CONSIGNOR.
- C. TWO SMALL CARS FURNISHED BY CARRIER IN LIEU OF A LARGER CAR ORDERED BY THE SHIPPER.
- D. RATES CHARGEABLE ON A LARGER CAR FURNISHED FOR THE CONVENIENCE OF THE INITIAL CARRIER UNDER TARIFF AUTHORITY FOR APPLYING THE MINIMUM WEIGHT APPLICABLE ON THE SMALLER CAR ORDERED BY THE SHIPPER, WHERE THE CONNECTING LINE DOES NOT PUBLISH SUCH A TARIFF PROVISION.
- E. RATES APPLICABLE ON GASOLINE MOTOR CARS MOVING UNDER THEIR OWN POWER OVER CARRIER'S RAILS.
- F. CHARGES TO APPLY ON A PREPAID SHIPMENT THAT IS STOPPED AND DELIVERED AT AN INTERMEDIATE POINT.
- G. INTERSTATE FREIGHT RATES MUST APPLY ACCORDING TO THE MOVEMENT OF THE TRAFFIC.
- H. ONLY ONE LEGAL RATE CAN EXIST BETWEEN ANY TWO POINTS AT ANY GIVEN TIME.

- I. THE LEGAL RATE APPLICABLE TO AN INTERSTATE SHIPMENT IS THE PUBLISHED THROUGH RATE IN EFFECT AT THE TIME THE SHIPMENT IS RECEIVED BY THE CARRIER FOR TRANSPORTATION AND OVER THE ROUTE WHICH IT IS TO MOVE.
- J. RATES APPLICABLE ON SHIPMENTS TO COLON, PANAMA.
- K. RIGHT OF SHIPPER WITH REFERENCE TO THE MANNER OF SHIPPING A COMMODITY.
- L. CONFLICTING RATES IN PUBLISHED TARIFF.
- M. RATES APPLICABLE ON MATERIALS FOR REPAIR OF CARS ON FOREIGN LINES.
- N. SPECIAL RATE ON SHIPMENTS IN FOREIGN CARS.
- O. RATES ON CONSOLIDATED CARLOADS OF LESS-THAN-CARLOAD SHIPMENTS.
- P. IN THE ASSESSMENT OF FREIGHT RATES THE TRUE CHARACTER OF THE COMMODITY CONTROLS.
- Q. RATE TO GOVERN TRANSPORTATION SERVICE THAT HAS BEEN RENDERED FOR WHICH THERE IS NO TARIFF AUTHORITY.
- R. DUTY OF SHIPPER TO OBSERVE TARIFF PROVISIONS.

### **607. Payment for transportation.**

### **608. Factors and elements in rate-making.**

- A. VALUE OF SERVICE TO THE SHIPPER.
- B. COST OF SERVICE TO THE CARRIER.
- C. VALUE OF SERVICE VERSUS COST OF SERVICE.
- D. CHARGING "WHAT THE TRAFFIC WILL BEAR."
- E. VALUE OF COMMODITY.
- F. RISK.
- G. VOLUME OF TRAFFIC.
- H. WEIGHT AND BULK OF ARTICLE.
- I. LOCOMOTIVE ON OWN WHEELS UNDER POWER.
- J. DISTANCE.
- K. COMPETITION.
- L. RELATIONS OF THE CARRIERS AND THE PUBLIC.
- M. COST OF PRODUCTION TO THE MANUFACTURER.
- N. INVESTMENT IN A COMMERCIAL ENTERPRISE RELYING UPON A CERTAIN RATE ADJUSTMENT.
- O. A CARRIER HAS NO RIGHT TO MAINTAIN A RATE ADJUSTMENT IN ORDER TO PRESERVE A COMMERCIAL PROFIT TO THE MANUFACTURER.
- P. ADJUSTMENT OF RATES TO INDUCE MOVEMENT OF TRAFFIC.
- Q. THE RIGHT OF A RAILROAD COMPANY TO FIX ITS RATES.
- R. RIGHT OF CARRIER TO SHARE IN GENERAL PROSPERITY OF THE COUNTRY.
- S. SERVICES IN THE DELIVERY AND RECEIPT OF TRAFFIC AT TERMINALS.
- T. LOW RATES TO TAKE CARE OF EMPTY CAR MOVEMENT.
- U. IMPORT DUTIES.
- V. MAPS OFFICIALLY PUBLISHED BY RAILROAD COMPANIES CONTROLLING AS TO TARIFFS.
- W. RATES OF WATER CARRIERS.
- X. AGGREGATE VALUE OF THE RAILWAY PROPERTY OF THE CARRIER HELD FOR AND USED IN THE SERVICE OF TRANSPORTATION.
- Y. RATES ON DAMAGED, SECOND HAND, AND USED ARTICLES.

**609. Reasonableness of freight rates.**

- A. REASONABLENESS OF RATES GENERALLY.
- B. RATES AND DEBATES.
- C. MANDATE OF STATUTE THAT TRANSPORTATION CHARGES BE JUST AND REASONABLE.
- D. MEANING OF THE TERMS "JUST" AND "REASONABLE."
- E. QUESTION OF REASONABLENESS OF RATE ONE OF FACT.
- F. JUST AND REASONABLE TRANSPORTATION REGULATIONS AND PRACTICES REQUIRED TO BE ESTABLISHED BY CARRIERS.
- G. ENFORCEMENT OF RULES AND REGULATIONS NOT SHOWN IN PUBLISHED TARIFFS AS AFFECTING THE REASONABLENESS OF THE RATE.
- H. FREIGHT RATES TO BE ON A BASIS THAT WILL YIELD AN AGGREGATE ANNUAL NET OPERATING INCOME EQUAL, AS NEARLY AS MAY BE, TO A FAIR RETURN UPON THE AGGREGATE VALUE OF THE RAILWAY PROPERTY OF THE CARRIER HELD FOR AND USED IN THE SERVICE OF TRANSPORTATION.
- I. A RATE, REASONABLE per se, MAY BE UNLAWFUL ON OTHER GROUNDS.
- J. THE REASONABLE RATE AND COST OF SERVICE.
- K. COMPARISON OF FREIGHT RATES.
- L. THE PUBLIC IS NOT THE GENERAL MANAGER OF RAILROADS RESPECTING THEIR RATES.
- M. LOW RATES FOR LOW-GRADE TRAFFIC.
- N. LOW RATES FOR CARRIAGE OF LONG-HAUL TRAFFIC.
- O. RATES ESTABLISHED BY CONCERT OF ACTION BETWEEN THE CARRIERS.
- P. RATE-PER-TON-PER-MILE TEST OF REASONABLENESS.
- Q. AVERAGE RATE PER TON ON ALL FREIGHT.
- R. CARRIERS SERVING UNDEVELOPED TERRITORY ENTITLED TO HIGHER RATES THAN ORDINARILY.
- S. RATES ESTABLISHED TO DEVELOP A PARTICULAR INDUSTRY.
- T. TONNAGE SHIPPED BY A PARTICULAR FIRM.
- U. RATES FIXED ACCORDING TO THE USAGE OF THE COMMODITY, OR "BUSINESS MOTIVE" OF THE SHIPPER ARE UNREASONABLE AND UNLAWFUL.
- V. AGREEMENT BETWEEN CARRIER AND MUNICIPALITY FOR MAINTENANCE OF GIVEN RATE IN CONSIDERATION OF GRANT OF CERTAIN PRIVILEGES TO CARRIER BY CITY, NOT BINDING ON COMMISSION.
- W. A CARRIER MAY NOT RESTRICT TRAFFIC TO MOVEMENT BETWEEN POINTS ON ITS OWN LINES.
- X. EFFECT OF WIDESPREAD RATE ADJUSTMENT.
- Y. ESTABLISHMENT OF LOW RATES BY A CARRIER TO TEST THE TRAFFIC SITUATION.
- Z. EQUALIZING RATES OF DIFFERENT CARRIERS.
- AA. RATES VIA CIRCUITOUS ROUTES.
- BB. THE RIGHT OF A CARRIER TO RESERVE TO ITSELF THE LONG HAUL IN THE ESTABLISHMENT OF A THROUGH ROUTE.
- CC. HIGHER RATE OVER ROUTE COMPOSED OF TWO OR MORE CARRIERS THAN OVER A SINGLE LINE.
- DD. REASONABLENESS OF RATE BETWEEN TWO POINTS SERVED BY MORE THAN ONE CARRIER NOT TO BE DETERMINED BY RATE OF LINE MOST FAVORABLY SITUATED.

- EE. REASONABLENESS OF A THROUGH RATE COMPOSED OF THE AGGREGATE OF INTERMEDIATE RATES.
- FF. A JOINT THROUGH INTERSTATE RATE WHICH EXCEEDS THE AGGREGATE OF THE INTERMEDIATE RATES, SUBJECT TO THE ACT, IS UNLAWFUL AND NON-ENFORCEABLE.
- GG. UNREASONABLENESS OF A JOINT THROUGH RATE THAT EXCEEDS THE COMBINATION OF A LOCAL RATE AND AN UNDEFINED PROPORTIONAL RATE.
- HH. CANCELLATION OF A JOINT THROUGH RATE RESULTING IN A HIGHER COMBINATION OF LOCAL RATES.
- II. HIGHER RATE FOR A SHORTER THAN FOR A LONGER DISTANCE OVER THE SAME LINE OR ROUTE IN THE SAME DIRECTION, THE SHORTER BEING INCLUDED WITHIN THE LONGER DISTANCE.
- JJ. A RATE VOLUNTARILY ESTABLISHED BY RAILROAD COMPANY TO MEET COMPETITION IS NOT TO BE TAKEN AS THE MEASURE OF WHAT IS REASONABLE.
- KK. HIGHER RATES WHEN SHIPMENTS ARE TENDERED WITH OTHER THAN UNIFORM BILL OF LADING.
- LL. RELEASED-VALUATION RATES.
- MM. A CARRIER MAY NOT DEMAND A HIGHER RATE WHEN FREIGHT IS SHIPPED WITH THE CHARGES COLLECT THAN WHEN THE CHARGES ARE PREPAID.
- NN. MINIMUM CHARGE FOR TRANSPORTATION OF LESS-THAN-CARLOAD SHIPMENTS.
- OO. LOWER RATE FOR CARLOAD THAN FOR LESS-THAN-CARLOAD QUANTITIES.
- PP. TRAIN-LOAD RATES.
- QQ. HIGHER RATES ON PERISHABLE TRAFFIC THAN ON ORDINARY FREIGHT.
- RR. LOWER RATES FOR INLAND MOVEMENT OF EXPORT OR IMPORT TRAFFIC THAN FOR DOMESTIC TRAFFIC.
- SS. THE DIFFERENCE BETWEEN THE IMPORT RATE AND THE DOMESTIC RATE ON A GIVEN COMMODITY SHOULD NOT BE UNDUE OR UNREASONABLE.
- TT. AN IMPORTED COMMODITY IS NOT ENTITLED TO AN INLAND PROPORTIONAL RATE WHICH IS LOWER THAN THE DOMESTIC RATE WHEN THE TRANSPORTATION FROM THE PORT OF ENTRY IS PURELY LOCAL.
- UU. REQUIREMENT THAT IMPORT FREIGHT BE PLACED IN A BONDED WAREHOUSE OR DELIVERED TO THE RAIL CARRIER DIRECT FROM SHIP'S SIDE OR DOCK OF VESSEL AS CONDITION PRECEDENT TO APPLICATION OF IMPORT RATE.
- VV. CARRIERS MAY NOT ADJUST THEIR RATES SO AS TO REGULATE FOREIGN TRAFFIC THROUGH CERTAIN PORTS.
- WW. ANY-QUANTITY RATES.
- XX. GROUP OR "BLANKET" RATES.
- YY. GRADUATED RATES.
- ZZ. RATES ON MIXED CARLOADS.
- AAA. PROPRIETY OF BRIDGE TOLLS OR RIVER-CROSSING CHARGES.
- BBB. RESHIPPING RATES.
- CCC. RATES ON BRANCH-LINE HAULS.
- DDD. ESTABLISHMENT OF COMMODITY RATE AS EVIDENCE OF THE UNREASONABLENESS OF A PRIOR CLASS RATE.

- EEE. THE PUBLISHED RATE SCHEDULE IS *prima facie* EVIDENCE OF THE REASONABleness OF THE RATES STATED THEREIN.
- FFF. FILING RATE SCHEDULE WITH INTERSTATE COMMERCE COMMISSION IS NOT CONCLUSIVE OF THE REASONABleness OF THE RATES CONTAINED THEREIN.
- GGG. MAINTENANCE FOR A LONG PERIOD OF A RATE VOLUNTARILY ESTABLISHED BY THE CARRIER AS EVIDENCE OF ITS REASONABleness.
- HHH. PRESUMPTION WHERE LONG-ESTABLISHED RATE IS ADVANCED FOR A SHORT PERIOD AND THEN REDUCED TO THE FORMER BASIS.
- III. UNREASONABLE RATE NOT PERMISSIBLE MERELY BECAUSE ITS CORRECTION WILL RESULT IN THE DISTURBANCE OF OTHER RATES.
- JJJ. RIGHT OF CARRIER TO CHANGE AN UNREASONABLY LOW RATE.
- KKK. NO ESTOPPEL OPERATES AGAINST THE RIGHT OF A CARRIER TO ENJOY JUST AND REASONABLE RATES.
- LLL. BURDEN OF PROOF UNDER ALLEGATION OF UNREASONABLENESS.
- MMM. *Onus probandi* AS TO REASONABleness OF INCREASED RATE ON THE COMMON CARRIER.
- NNN. PRESUMPTION THAT CARRIER'S TARIFF PROVIDES REASONABLE CHARGES FOR THE SERVICES NORMALLY PERFORMED.
- OOO. VOLUNTARY REDUCTION OF A RATE BY THE CARRIER IS NOT CONCLUSIVE THAT THE PRIOR RATE WAS UNREASONABLE.
- PPP. THE FACT THAT A RATE ESTABLISHED BY A CARRIER DOES NOT APPLY between THE SAME POINTS IS NOT CONCLUSIVE OF ITS UNREASONABLENESS.
- QQQ. DOUBT AS TO REASONABleness OF RATE SHOULD BE RESOLVED IN FAVOR OF THE CARRIER.
- RRR. RAILWAY-MAIL PAY.
- SSS. COMPENSATION TO CERTAIN LAND-GRANT ROADS.
- TTT. ERRORS IN PUBLICATION OF RATES.
- UUU. BASING-POINT SYSTEM OF RATES.
- VVV. EFFECT OF PRIVATE AGREEMENT BETWEEN CARRIER AND SHIPPER CONCERNING TRANSPORTATION CHARGES ON QUESTION OF REASONABleness OF RATE.
- WWW. EQUALIZING RATES IN AND OUT OF COMPETING JOBBING CENTERS IMPRACTICABLE.
- XXX. THE CHARGING OF AN UNREASONABLE RATE IS A TORT.

#### 610. Comparison of freight rates.

- A. NECESSITY FOR COMPARISON OF RATES.
- B. FACTS TO BE CONSIDERED IN COMPARING RATES.
- C. COMPARISON OF RATES ON DIFFERENT BRANCHES OR LINES OF THE SAME CARRIER.
- D. COMPARISON OF RATES VIA COMPETING LINES.
- E. COMPARISON OF RATES ON DIFFERENT LINES IN DIFFERENT SECTIONS OF THE COUNTRY.
- F. THE DIVISIONS OF A JOINT THROUGH RATE ARE NO CRITERIA BY WHICH TO MEASURE LOCAL RATES.
- G. DIVISION OF JOINT THROUGH RATE NOT CONCLUSIVE EVIDENCE OF REASONABleness OF JOINT THROUGH RATE ITSELF.
- H. RELATION BETWEEN WATER AND RAIL TRANSPORTATION.

- I. COMPARISON BETWEEN PRESENT RATE AND LOWER RATE MAINTAINED IN THE PAST.
- J. COMPARISON OF RATES TO COMPETITIVE AND NON-COMPETITIVE POINTS.
- K. COMPARISON OF LOCAL AND PROPORTIONAL RATES.
- L. COMPARISON OF RATES IN OPPOSITE DIRECTIONS.
- M. COMPARISON BETWEEN CLASS AND COMMODITY RATES.
- N. RELATIONSHIP OF RATES ON RAW MATERIALS TO COMPETING INDUSTRIES.
- O. COMPARISON BETWEEN CARLOAD AND LESS-THAN-CARLOAD RATES.
- P. COMPARISONS SHOULD BE MADE OF VOLUNTARY RATES.
- Q. COMPARISON OF RATES UNSUPPORTED BY EVIDENCE OF VARIOUS CIRCUMSTANCES AND CONDITIONS.
- R. RATE-PER-TON-PER-MILE COMPARISONS.
- S. TERMINAL SERVICES IN THE DELIVERY AND RECEIPT OF TRAFFIC AS ELEMENTS TO BE CONSIDERED IN RELATIONSHIP OF RATES.
- T. RELATIONSHIP BETWEEN COMMODITIES.
- U. COMPARISON OF RATES ON RAW MATERIALS AND MANUFACTURED PRODUCTS.
- V. RATES FIXED BY STATE AUTHORITIES AS STANDARDS IN FIXING INTERSTATE RATES.

#### 611. Advances in freight rates.

- A. METHODS OF ADVANCING RATES.
- B. EQUALIZATION OF DISCRIMINATIONS.
- C. ADVANCE IN RATE TO CORRECT ERRONEOUS PRIOR RATE.
- D. MAINTENANCE OF HIGHER INTRASTATE RATE THAN INTERSTATE RATE.
- E. INCREASE IN INTRASTATE RATES TO REMOVE ANY UNDUE OR UNREASONABLE ADVANTAGE, PREFERENCE, PREJUDICE OR DISCRIMINATION AGAINST INTERSTATE OR FOREIGN COMMERCE.
- F. PRESUMPTION WHERE LONG-ESTABLISHED RATE IS ADVANCED FOR A SHORT PERIOD AND THEN REDUCED TO ITS FORMER BASIS.
- G. ADVANCE IN RATES TO PRESERVE PROPER RELATION BETWEEN COMMODITIES.
- H. CANCELLATION OF COMMODITY RATES BECAUSE OF LACK OF MOVEMENT OF TRAFFIC.
- I. CARRIERS ADVANCING CERTAIN RATES TO AVOID REDUCING OTHER RATES.
- J. DISPUTES BETWEEN CARRIERS AS TO DIVISIONS DO NOT JUSTIFY INCREASES OF RATES.
- K. CARRIERS ARE NOT ESTOPPED FROM ADVANCING RATES BECAUSE OF A RESULTING INJURY TO SHIPPERS.
- L. INCREASE IN RATES RESULTING IN INCREASE IN DISCRIMINATION.
- M. RIGHT OF A CARRIER TO ADVANCE ITS RATES.
- N. NO PRESUMPTION OF WRONG ARISES FROM AN ADVANCE IN RATES.

- O. INVESTIGATION AND SUSPENSION OF NEW RATE, CHARGE, REGULATION OR PRACTICE.
  - P. BURDEN OF PROOF AS TO REASONABLENESS OF INCREASED RATE UPON COMMON CARRIER.
  - Q. AFTER EXPIRATION OF COMMISSION'S ORDER SUSPENDING TARIFF CONTAINING NEW RATES, CHARGES, REGULATIONS OR PRACTICES, THE PROPOSED RATES CONTAINED THEREIN DO NOT AUTOMATICALLY GO INTO EFFECT.
  - R. MAINTENANCE OF PORT DIFFERENTIALS ON INCREASED RATES.
  - S. INCREASED RATES OF BOAT LINES.
  - T. INCREASED FREIGHT RATES OF ELECTRIC LINES.
  - U. INCREASE IN MINIMUM CARLOAD CHARGE, MINIMUM CLASS SCALE, AND MINIMUM CHARGE PER SHIPMENT.
  - V. INCREASE IN JOINT RATES TO AND FROM FOREIGN COUNTRIES.
  - W. EFFECTIVE DATE OF RATES AND SUBSEQUENT ADJUSTMENTS UNDER INCREASED RATES, 1920, COVERED BY EX PARTE 74.
  - X. INCREASES IN CHARGES FOR SPECIAL SERVICES.
  - Y. GENERAL INCREASES IN FREIGHT RATES.
  - Z. PERCENTAGE INCREASES VERSUS FLAT INCREASES AND MAINTENANCE OF DIFFERENTIALS AND RELATIONSHIPS.
  - AA. INCREASES IN RATES ON INDIVIDUAL COMMODITIES.
- 612. Investigation and suspension of new rates, charges, regulations or practices.**
- 613. Jurisdiction of Interstate Commerce Commission over freight rates and charges.**

- A. CONTROL OF THE COMMISSION OVER FREIGHT RATES AND CHARGES GENERALLY.
- B. POWER OF COMMISSION TO DETERMINE RATES, AND TO FIX MAXIMUM, MINIMUM, OR PRECISE RATES.
- C. COMMISSION MAY DETERMINE AND PRESCRIBE JUST AND REASONABLE REGULATIONS AND PRACTICES.
- D. COMMISSION MAY ORDER CARRIERS TO CEASE AND DESIST FROM THE FULL EXTENT OF VIOLATIONS FOUND.
- E. POWER OF COMMISSION TO INVESTIGATE NEW RATE, CLASSIFICATION, REGULATION OR PRACTICE.
- F. POWER OF COMMISSION TO RESTRAIN ENFORCEMENT OF NEW RATE, CLASSIFICATION, REGULATION OR PRACTICE PENDING INVESTIGATION OF THE SAME.
- G. TIME WHEN ORDERS OF COMMISSION TAKE EFFECT.
- H. BURDEN OF PROOF AS TO REASONABLENESS OF INCREASED RATE ON COMMON CARRIER.
- I. PRIMARY JURISDICTION OF COMMISSION TO DETERMINE REASONABLENESS OR UNREASONABLENESS OF AN INTERSTATE RATE.
- J. FINALITY OF CONCLUSIONS OF COMMISSION ON QUESTIONS OF FACT.
- K. POWER OF COMMISSION TO ESTABLISH JOINT RATES AND DIVISIONS THEREOF.
- L. COMMISSION MAY NOT ESTABLISH THROUGH RATES IN CONNECTION WITH STREET-ELECTRIC-PASSENGER RAILWAYS.

- M. POWER OF COMMISSION TO ESTABLISH JOINT RATES BETWEEN STEAM RAILWAYS AND INTERURBAN-ELECTRIC RAILWAYS.
- N. COMMISSION NO AUTHORITY TO ESTABLISH JOINT THROUGH RATES WITH INDEPENDENT WATER CARRIERS.
- O. POWER OF COMMISSION TO ESTABLISH JOINT THROUGH RATES WITH BELT RAILROAD.
- P. COMMISSION NO POWER TO ESTABLISH JOINT THROUGH RATES BETWEEN POINTS IN THE UNITED STATES AND POINTS IN ADJACENT FOREIGN COUNTRIES.
- Q. POWER OF COMMISSION TO ESTABLISH JOINT THROUGH RATES IS DISCRETIONARY WITH THAT BODY AND NOT REVIEWABLE BY THE COURTS.
- R. COMMISSION MAY ESTABLISH JOINT THROUGH RATE IF DISCRIMINATION IS FOUND TO EXIST.
- S. COMMISSION MAY ORDER MAINTENANCE OF JOINT THROUGH RATE WHEN ITS CANCELLATION WILL RESULT IN HIGHER CHARGE BASED UPON COMBINATION OF LOCALS.
- T. POWER OF COMMISSION TO RELIEVE FROM THE OPERATION OF THE LONG-AND-SHORT-HAUL CLAUSE.
- U. COMMISSION MAY MAKE ORDER PRESCRIBING THE SAME RATE FOR SIMILAR SERVICES TO OTHER SHIPPERS.
- V. COMMISSION NO POWER TO ADVANCE RATES TO TEMPORARILY IMPROVE BUSINESS CONDITIONS.
- W. POWER OF COMMISSION TO CONSIDER EFFECT ON THE BUSINESS OF AN INDUSTRY IN ADVANCING RATES.
- X. DETERMINATION OF NATURE OF COMMODITY IS A JUDICIAL QUESTION.
- Y. JURISDICTION OF COMMISSION OVER RAILWAY-MAIL PAY.
- Z. COMMISSION NO POWER TO FIX RATES EXCEPT UPON TRAFFIC CONSIDERATIONS.
- AA. COMMISSION NO POWER TO SUBSTITUTE A NEW RATE FOR A JUST AND REASONABLE RATE.
- BB. COMMISSION NO POWER TO ANNUL A RATE EXCEPT BY A FORMAL ORDER MADE IN CONFORMITY WITH SECTION 15 OF THE ACT.
- CC. COMMISSION NO POWER TO EQUALIZE RATES.
- DD. NOT WITHIN THE PROVINCE OF THE COMMISSION TO REQUIRE CARRIERS TO ADJUST THEIR RATES SO AS TO EQUALIZE NATURAL OR COMMERCIAL ADVANTAGES.
- EE. COMMISSION NO POWER TO PROTECT AMERICAN MANUFACTURERS AND PRODUCERS FROM FOREIGN COMPETITION.
- FF. THE OMISSION OF THE COMMISSION TO FIX A FUTURE RATE IS NOT INCONSISTENT WITH AN ORDER FOR REPARATION FOR PAST INJURIES BY REASON OF THE ASSESSMENT OF AN UNREASONABLE RATE.
- GG. JURISDICTION OF COMMISSION OVER RATES FOR TRANSPORTATION OF GOVERNMENTAL MATERIALS AND WAR TRAFFIC.
- HH. COMMISSION'S "FLEXIBLE LIMIT OF JUDGMENT WHICH BELONGS TO THE POWER TO FIX RATES."
- II. JUDICIAL REVIEW OF ORDERS OF INTERSTATE COMMERCE COMMISSION.
- JJ. POWER OF COMMISSION OVER LOCAL STATE RATE ON THROUGH INTERSTATE SHIPMENT.

- KK. POWER OF COMMISSION OVER FIXATION OF TERMS AND COMPENSATION FOR COMMON USE OF TERMINAL FACILITIES.
- LL. JURISDICTION OF COMMISSION OVER RATES ON EXPORT AND IMPORT TRAFFIC.
- MM. AUTHORITY OF DIVISIONS OF THE COMMISSION TO DETERMINE QUESTIONS UNDER THE ACT.
- NN. POWER OF COMMISSION TO PRESCRIBE RATE, CLASSIFICATION, REGULATION, OR PRACTICE TO GOVERN INTRASTATE COMMERCE IN ORDER TO REMOVE A PREFERENCE, PREJUDICE, OR DISCRIMINATION AGAINST INTERSTATE OR FOREIGN COMMERCE.
- OO. TRANSPORTATION OF COMMISSION'S VALUATION SUPPLIES.
- PP. POWER OF COMMISSION OVER INTRASTATE RATES DURING THE PERIOD OF FEDERAL CONTROL.
- QQ. POWER OF INTERSTATE COMMERCE COMMISSION OVER RATES AND CHARGES AFTER TERMINATION OF FEDERAL CONTROL AND PRIOR TO SEPTEMBER 1, 1920—INTRASTATE AND INTERSTATE RATES.

- 614. Classification of freight and freight classifications.
- 615. Fourth section of the Interstate Commerce Act—Long-and-short-haul clause—Fourth-section applications.
- 616. Weights and weighing.
- 617. Routes and routing.
- 618. Protective services in transportation of perishable traffic.
- 619. Transit privileges, facilities and regulations.
- 620. Elevation.
- 621. Contracts between shippers and carriers concerning transportation charges.
- 622. Terminal facilities and regulations.
- 623. Demurrage or "car-service" and detention charges.
- 624. Limitation of common carrier's liability—Initial carrier's liability.
- 625. Free and reduced-rate transportation of property.
- 626. Allowances by carriers to owners of transported property.
- 627. Allowances to terminal railroads and boat lines owned or controlled by shippers.
- 628. Switching—Switch connections—Private side-tracks.
- 629. Discriminations, preferences and advantages.

- 630. Rebates and concessions.
- 631. Damages and reparation—Claims between shippers and carriers.
- 632. Railroad company freight tariffs or rate schedules.
- 633. Publication, posting and filing of freight rates and charges.
- 634. Transportation of live stock.
- 635. Express companies and express traffic.
- 636. Express company freight tariffs or rate schedules.
- 637. Practice and procedure before the Interstate Commerce Commission.
- 638. Civil proceedings in the Courts.
- 639. Water carriers—Panama Canal Act.
- 640. Telegraph, telephone, cable and radiotelegraph companies.
- 641. Penalties and forfeitures—Criminal proceedings.
- 642. Federal control of common carriers—United States Railroad Administration.
- 643. Railway finances—Guaranteed return on railway property.

**600. Different kinds of freight rates defined and their usage.****600-A. LOCAL RATES.**

Rates charged between points located upon the same railroad are known as "local rates." For example: a rate from Buffalo, N. Y., to Binghamton, N. Y., via D. L. & W. R. R. Co., is local to that road, inasmuch as both points are located on that line. And this is true regardless of the fact that both points may be located on other or competing lines of railroad.

In the publication of their rates, carriers often publish their local rates in separate tariffs from those carrying the joint rates.

The changes in local rates are, as a rule, less frequent than in joint rates.<sup>1</sup>

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1. Sixteenth Annual Report of I. C. C. (1903)

**600-B. JOINT RATES**

The term "joint rate" is construed to mean a rate that extends over the lines of two or more carriers and that is made by joint agreement between such carriers.<sup>1</sup> For example: a published through rate from Chicago, Ill., to Dallas, Texas, via Illinois Central and Frisco Lines, is a joint rate over those lines, the same having been published under agreement between those lines for a fixed division of the revenue.

A joint rate is simply a through rate, every part of which has been made by express agreement between the carriers forming the through route.<sup>2</sup>

See "*Joint Rates*" Section 601, post.

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1. Tariff Circular 18-A.

2. In Re Through Routes and Through Rates (1907) 12 I. C. C. Rep. 164.

**600-C. THROUGH RATES**

A through rate is the rate applicable from the point of origin of a shipment to its destination.<sup>1</sup> That may be (a) a local rate where both points are located upon the line of one road or a combination of the separately established local rates of such road, or (b) a joint rate over a through route composed of two or more roads which have agreed to a joint rate, or, (c) a combination of separately established rates applicable on through business over a through route which does not enjoy a joint rate.<sup>2</sup> A through rate is a continuous line of railway formed by an arrangement express or implied, between connecting carriers. It must have a rate for every service it offers, and as the route is a new unit, so its rate for every service is a unit, even though it be divided between the several carriers arranging themselves into the through route. Where a *through route* has been formed the rate charged is a *through rate*.<sup>3</sup>

See "*Through rates*" Section 602, post.

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1. Laning-Harris Coal & Grain Co. v. Missouri P. Ry. Co. (1908), 13 I. C. C. Rep. 154.

2. Ibid.

3. In Re Through Routes & Through Rates (1907) 12 I. C. C. Rep. 164

## 600-D. PROPORTIONAL RATES.

A proportional rate is a proportion of a through rate which is lower between points when the traffic has undergone transportation before reaching the first point, or is to be further transported after reaching the second than the rates charged on like traffic which originates at one of such points and terminates at the other.<sup>1</sup>

It is a part of or a remainder of the through rate, and as such must be considered in relation to the whole rate.<sup>2</sup>

A proportional rate is defined as one which applies to part of a through transportation which is entirely within the jurisdiction of the Act to Regulate Commerce; that is, the balance of the transportation to which the proportional rate applies must be under a rate filed with the Commission.<sup>3</sup>

The Interstate Commerce Commission has provided in its tariff circular that:<sup>4</sup>

Tariffs containing basing or proportional rates must specify clearly the extent and manner of their use, and tariffs that are especially intended for use in connection with published basing rates must show the I. C. C. numbers of tariff in which basis can be found.

A "proportional rate," as the term implies, is simply a part of a through rate. It is the share of the aggregate charge from origin to destination which one or more of the carriers accepts for performing a definite portion of the whole transportation service. It is a matter of common knowledge that through rates are generally less than the sum of intermediate local rates; and when all the participating carriers do not join in establishing the through rates, it is a common practice for one or more of them to name proportional rates up to some point of connection with another carrier which completes or continues the transportation. The propriety and lawfulness of proportional rates to the points of transfer which are less than local rates to that point have frequently been affirmed by the Interstate Commerce Commission, and are sanctioned by considerations of public policy.<sup>5</sup>

The idea of differing proportional rates for the same service depending upon the origin or destination of the traffic did not originate with the Interstate Commerce Commission. It originated with and has been used by carrier to a greater or less extent.<sup>6</sup>

The Panama Canal Act in authorizing the Interstate Commerce Commission to establish maximum rates by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessel and upon what terms and conditions such rates shall apply, provides that "by proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water."<sup>7</sup>

A proportional rate like any other rate should be open to all shippers.<sup>8</sup>

A proportional rate is nothing more or less than a separately established rate, as that phrase is used in Section 6 of the amended Act, applicable to through transportation. It has not been understood by the Commission that a separately established rate can be other than

an open rate available to all. The separately established or proportional rate is simply one way of making up the through charges between two points. While there is no criticism of proportional rates applicable only to through movements from a defined territory or group of points, the Commission has never recognized as valid a proportional rate limited to shipments that come into the proportional rate point over the lines of a particular carrier. A proportional rate, the use of which is limited to shipments over a particular line, would appear to be a rate that discriminates against shippers over another line.<sup>9</sup>

There is no uniform percentage relationship between local and proportional rates, the proportional rates from one point being made with relation to those from a competitive point to the same markets.<sup>10</sup>

The Commission has in several instances held that a proportional rate applying to through traffic might well be lower than the corresponding local rate.<sup>11</sup>

A proportional rate may not be condemned simply because it exceeds the local rate between the same points or because it may yield excessive earnings for that part of the through movement. A shipper has no real grievance with respect to his through traffic unless compelled to pay excessive charges for the through service. It frequently happens, however, that the through charge for a through service is unreasonable because one of its factors is excessive; in such a case on a proper record, the excessive proportional rate may be redned.<sup>12</sup>

A proportional rate applying on through traffic might well be less than the corresponding local rate, but the Commission has not ruled that such proportional rate must be, or in every case should be, less. There may be, and are, many instances in which full local rates are applied as proportions in the construction of through rates, and the rate so established can only be condemned upon a satisfactory showing that it is unreasonable, unduly discriminatory, or otherwise in contravention of law.<sup>13</sup>

Under the holdings of the Commission a proportional rate can not be compared with an intermediate local rate to show a violation of the fourth section.<sup>14</sup>

It is in essence a division of a through rate, and the Commission has several times held that undue discrimination does not under such circumstances of necessity arise where a higher rate is maintained from an intermediate point.<sup>15</sup>

The Commission has repeatedly held that a carrier may not lawfully make rates to a given point on its line on traffic going beyond by wagon or other similar conveyance, which are lower than its established rates to that point as a final destination.<sup>16</sup>

*Example of application of proportional rates:* Cincinnati, O., is an 87 and Louisville is a 100 per cent point in the Trunk Line adjustment, but to the Virginia Cities, the lines from Louisville have established therefrom the same rates as are applicable from Cincinnati. The first-class rate from Chicago to New York, prior to the recent general increase, was 75 cents per 100 pounds, and that to Baltimore (and consequently to Norfolk and other Virginia Cities) 72 cents. The first-

class rates from Cincinnati and Louisville were accordingly 65 cents to New York and 62 cents to Baltimore and the Virginia Cities. On traffic from Chicago to the Virginia Cities, the Chicago-Cincinnati lines generally demanded as a division their full locals to Cincinnati (40, 34, 25, 17, 15, and 12), and in order for the Cincinnati-Norfolk lines to participate in traffic to Norfolk at an equality of rates with Baltimore, it was necessary for them to establish proportionals equal to the difference between the Chicago-Baltimore and the Chicago-Cincinnati rate, as follows: 32, 28, 22, 15, 12 and 10; these proportionals being applicable to traffic to all of the Virginia Cities and to Louisville as well as Cincinnati.<sup>17</sup>

In the case of *Baltimore Chamber of Commerce v. Baltimore & Ohio Railroad Company*,<sup>18</sup> the Commission said: "It is insisted that the proportional or reshipping rate from Chicago and the other points named in the second table are in fact nothing but local rates; that the name 'reshipping,' as at present in use, is but a cloak to cover the real nature of the rate; that grain in elevators at said points is local grain, and the rates under which it moves out are therefore local rates.

"Undoubtedly, a movement is either through or local; there is no middle ground; but to say that movements of the character referred to are local, as distinguished from through movements, would be to hold that the tariffs which provide transit privileges at the points named are unlawful. Such tariffs have been in recognized use too long to be condemned on the meager evidence here presented.

"There is no substantial difference between a 'reshipping' rate and what is known as a 'proportional' rate. We have held that proportional rates are not *per se* unlawful, and we see no reason to condemn 'reshipping' rates as such."

In the case of *St. Paul Board of Trade v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*,<sup>19</sup> the defendant maintains two proportional rates out of Minnesota concentrating markets to Manistee, Mich., on butter and eggs destined to eastern points, one of 20 cents and one of 40 cents per 100 pounds, the former being limited in its application to butter and eggs that have reached the concentrating points over defendant's line, and the 40-cent rate being an open rate applicable on butter and eggs reaching those markets over other rails: *Held*, That the defendant may make a distinction between shipments originating at the concentrating points, so far as its line is concerned, and traffic upon which it has had a haul into the concentrating points; but it may do this only under proper tariff provisions connecting the inbound with the outbound movement, and then only when the inbound movement to the concentrating points proceeds under rates on file with the Commission.

A proportional rate of 11 cents on lumber from Winfield, Ala., to Thebes, Ill., restricted in its application to shipments destined beyond Thebes, held inapplicable when the only destination indicated on the bill of lading, was Thebes proper.<sup>20</sup>

Schedules of freight rates of a designated railroad, indicating that they were adopted by it "in connection with" other specified roads over which shipments from the common points, if any, would be made, may be applicable to a shipment over a different railroad from a city which

is not a common point, where such schedules do not restrict the rate to shipments received from the roads specified, but indicate its applicability to shipments received from any connecting line.<sup>21</sup>

A joint proportional rate made by railroad companies from the Kanawha District in West Virginia to Toledo, O., "on cargo coal when for lake shipment beyond," does not apply to coal, which, although originally intended for lake shipment, was sold and delivered to vessels at Toledo as bunker coal.<sup>22</sup>

Being separate parts of through rates, proportional rates, in order to be lawful, must be established, within the meaning of Section 6, by the publication and filing with the Interstate Commerce Commission. A different rule is applicable to divisions.<sup>23</sup>

On the question of an undefined proportional rate as a factor in considering the reasonableness of a joint through rate, see "*Unreasonableness of a joint through rate that exceeds the combination of a local rate and an undefined proportional rate*," Section 609—GG, post.

1. In Re Form and Contents of Rate Schedules (1894) 4 I. C. Rep. 701.
2. Kansas City Transportation Bureau v. Atchison T. & S. F. Ry. (1909) 16 I. C. C. Rep. 195, 201; Boney & Harper Milling Co. v. Atlantic C. L. Rd. Co. (1913), 28 I. C. C. Rep. 383, 387; Becker v. Pere Marquette Rd. Co. (1913), 28 I. C. C. Rep. 645, 651; In Re Export Rates on Grain from Kansas City to Port Arthur (1914), 21 I. C. C. Rep. 616, 619; Board of Trade of Kansas City v. St. Louis & S. F. Rd. Co. (1914) 32 I. C. C. Rep. 297, 307.
3. Fourth-Section Circular No. 1 (March 13, 1911); cited Crescent Coal & Mining Co. v. Chicago & E. I. Rd. Co. (1912) 24 I. C. C. Rep. 149, 155.
4. Tariff Circular 18-A, Rule 5, b; cited Crescent Coal & Mining Co. v. Chicago & E. I. Rd. Co. (1912), 24 I. C. C. Rep. 149, 155.
5. Hocking V. Ry. Co. v. Lackawanna Coal & L. Co. (1915), 224 Fed. Rep. 930, citing Kansas City Transportation Bureau v. Atchison T. & S. F. Ry. Co., 16 I. C. C. Rep. 195, 201; Southwestern Shippers' Traffic Ass'n v. Atchison T. & S. F. Ry. Co. (1912), 24 I. C. C. Rep. 570, 578; Boney & Harper Milling Co. v. Atlantic C. L. Rd. Co. (1913), 28 I. C. C. Rep. 383, 388.
6. In Re Investigation & Suspension of Advances in Rates by Carriers operating between the Mississippi and Missouri Rivers (1911), 21 I. C. C. Rep. 546, 551.
7. Act to Regulate Commerce, Section 6 (as amended August 24, 1912).
8. In Re Restricted Rates (1911) 20 I. C. C. Rep. 426, 436.
9. Basecom Co. v. Atchison T. & S. F. Ry. Co. (1909), 17 I. C. C. Rep. 354, 356; Rosenbaum Bros. Co. v. Louisville & N. Rd. Co. (1911), 22 I. C. C. Rep. 62; Chattanooga Packet Co. v. Illinois C. Rd. Co. (1915), 33 I. C. C. Rep. 384, 391; Greater Des Moines Committee, Inc. v. Director General, as Agent, Chicago, M. & St. P. Ry. Co. (1920) 60, I. C. C. Rep. 403, 407.
10. Indianapolis Freight Bureau v. Cleveland C. C. & St. L. Ry. Co. (1909), 15 I. C. C. Rep. 504, 511.
11. Board of Railroad Commissioners of the State of Kansas v. Atchison T. & S. F. Ry. Co. (1912), 22 I. C. C. Rep. 407, 415.
12. State of Iowa v. Chicago St. P. M. & O. Ry. Co. (1913), 28 I. C. C. Rep. 64, 73.
13. Boney & Harper Milling Co. v. Atlantic C. L. Rd. Co. (1913). 28 I. C. C. Rep. 383, 388.
14. In Re Lumber Rates from the South to Ohio River Crossings (1912) 25 I. C. C. Rep. 50, 60.
15. Southwestern Missouri Millers' Club v. St. Louis & S. F. Rd. Co. (1914), 29 I. C. C. Rep. 28, 29, citing Baltimore Chamber of Commerce v. Baltimore & O. Rd. Co. (1912), 22 I. C. C. Rep. 596; Southern Illinois Millers' Ass'n v. Louisville & N. Rd. Co. (1912), 23 I. C. C. Rep. 672.
16. Bayou City Rice Mills v. Texas & N. O. Rd. Co. (1910), 18 I. C. C. Rep. 490, 493, citing Cary v. Eureka Springs Ry. Co. (1897), 7 I. C. C. Rep. 286; Wylie v. Northern P. Ry. Co. (1905), 11 I. C. C. Rep. 145.
17. City of Danville v. Southern Ry. Co. (1915), 34 I. C. C. Rep. 430, 435.
18. Baltimore Chamber of Commerce v. Baltimore & O. Rd. Co. (1912), 22 I. C. C. Rep. 596, 600; cited in Southern Illinois Millers' Ass'n v. Louisville & N. Rd. Co. (1912), 23 I. C. C. Rep. 672, 677.
19. St. Paul Board of Trade v. Minneapolis St. P. & S. S. M. Ry. Co. (1910), 19 I. C. C. Rep. 285.
20. Beekman Lumber Co. v. Illinois C. Rd. Co. (1911), 20 I. C. C. Rep. 98.

21. Kansas City Southern Ry. Co. v. Albers Commission Co. (1912), 223 U. S. 573, 595, 32 Sup. Ct. Rep. 316, 56 L. Ed. 556.
22. Hocking V. Ry. Co. v. Lackawanna Coal & Lumber Co. (1915), 224 Fed. Rep. 930.
23. Greater Des Moines Committee, Inc. v. Director General, as Agent, Chicago, M. & St. P. Ry. Co. (1920) 60 I. C. C. Rep. 403, 407, Citing Bascom Co. v. United States (1909) 17 I. C. C. Rep. 354, 356.

#### 600-E. ARBITRARIES.

The term "arbitrary" is a technical one expressing a difference which does not change with the through rate. The term is used to designate a rate not founded on a combination of other rates or upon a percentage theory of some general rate. It may be and frequently is lower than a rate established on a different basis. So long as such a rate is fair and equitable it is amenable to no valid objection.<sup>1</sup>

A proportion of a through rate charged by a carrier upon a long haul of freight, whether it be called an arbitrary or by some other designation such as "percentage," may well be considerably less than a local rate charged by the same carrier for the same distance over its line.<sup>2</sup>

Where a rate on through interstate shipment from a point on the line of one carrier to a point on the line of another is made up of proportional rates or arbitrarities to and from an intermediate point, the Commission may consider and pass such separately made proportions or arbitrarities.<sup>3</sup>

An arbitrary sum exacted in addition to the through rate on a given commodity, for the privilege of milling the commodity in transit, becomes a part of the aggregate through rate.<sup>4</sup>

On shipments of grain and grain products originating on lines of connecting carriers, defendants exacted an arbitrary of five cents per 100 pounds over and above its regular local rate on like traffic. This arbitrary was exacted by the defendant for the purpose of protecting its local traffic. *Held*, That a railroad company should seldom be permitted to charge more on through business than its regular local rate; that the imposition of the arbitrary was unjust and unreasonable.<sup>5</sup>

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1. Boston Chamber of Commerce v. Lake Shore & M. S. Ry. Co. (1888), 1 I. C. C. Rep. 436, 459, 1 I. C. Rep. 754.
  2. New Orleans Cotton Exchange v. Illinois C. Rd. Co. (1890), 3 I. C. C. Rep. 534, 560; 2 I. C. Rep. 777.
  3. Hilton Lumber Co. v. Wilmington & W. Rd. Co. (1901), 9 I. C. C. Rep. 17, 38.
  4. Listman Mill Co. v. Chicago M. & St. P. Ry. Co. (1898), 8 I. C. C. Rep. 47, 65.
  5. Blackwell Milling & Elevator Co. v. Missouri K. & T. Ry. Co. (1907), 12 I. C. C. Rep. 23.

#### 600-F. DIFFERENTIALS

Nothing is more certain concerning transportation in this country, either as to cost of service to the carrier or value of service to the shipper, than that as the mileage increases the total cost increases, but the cost per ton per mile decreases. This is true, although it cannot be stated in exact mathematical terms. It follows, and with particular force as applied to grouped points or origin and grouped points of destination, that differentials either above or below the rates from any given point become less and less important as distance of ultimate destination increases. Stated in other words, differentials diminish with increasing distance and vanish when the mileage on which the differential is based becomes incon siderable in proportion to the total mileage from basing point to destination.<sup>1</sup>

Where, because of difference in distance, the rates are different from a junction point of a carrier's own main line or branches, the differential should not be higher from points beyond from which the traffic moves through that junction than at such junction point.<sup>2</sup>

In *Chamber of Commerce v. New York C. & H. R. Rd. Co.*<sup>3</sup> the Commission said: "It is clear that the differential agreement was originally made in an attempt to equalize the total charges on import and export traffic through the several ports, as gateways. We have no jurisdiction of the ocean rates and must deal with this question as though the ports were destinations instead of gateways. This does not mean that the carriers may not take into consideration the previous or further transportation of the traffic on the ocean and thus differentiate it, reasonably, from domestic traffic, but the rates to and from the ports must be reasonable, must be published as independent from the ocean transportation, and are subject to all of the provisions of the act. *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.*, 13 I. C. C. 266; *Armour Packing Co. v. U. S.*, 209 U. S. 56."

In *St. Louis Chamber of Commerce v. Baltimore & O. Rd. Co.*<sup>4</sup> the Commission stated: "The propriety of a difference in treatment of differentials between contiguous points on long and short haul traffic has been recognized by the Commission. The reason for this is that on the long-haul traffic the volume of the rate is permitted by the distance to increase to a point where the additional cost of the service represented by the differential can be spread thinly over the line haul and finally absorbed without unduly encroaching upon the line-haul revenues, whereas on the short-haul traffic the distance is not such as to permit of a sufficient increase in the volume of the rate to warrant that absorption. A reflection of this principle in the general class and commodity rate adjustment to these very points, St. Louis and East St. Louis, was approved in *Business Men's League of St. Louis v. A. T. & S. F. Ry. Co.*, 44 I. C. C. 308. Under that adjustment the differential between the two cities is absorbed on traffic originating beyond a hundred-mile zone and assessed against the shipper on traffic originating within that zone."

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1. *Williams Co. v. Vicksburg S. & P. Ry. Co.* (1909), 16 I. C. C. Rep. 482, 487; *Black Mountain Coal Land Co. v. Southern Ry. Co.* (1909), 15 I. C. C. Rep. 286; *In Re Advances on Cement Plaster from Oklahoma to Texas* (1911), 21 I. C. C. Rep. 591, 599; *Sheridan Chamber of Commerce v. Chicago, B. & Q. Ry. Co.* (1913), 26 I. C. C. Rep. 638, 654.
  2. *Commercial Club of Superior v. Great N. Ry. Co.* (1912), 24 I. C. C. Rep. 96, 120.
  3. *Chamber of Commerce v. New York, C. & H. R. Rd. Co.* (1912), 24 I. C. C. Rep. 55, 74.
  4. *St. Louis Chamber of Commerce v. Baltimore & O. Rd. Co.* (1920), 57 I. C. C. Rep. 639, 647.

#### 600-G. CLASS RATES.

For convenience, the great majority of articles move on class rates. These are rates designated by numbers and letters, often bearing some definite percentage relationship to one another, and generally either based upon distance or made between specific points with due regard for distance. These rates standing alone are meaningless. Their applicability is determined by the governing classification. The classification is in general a list of articles that will move on the class rates, in the absence of specific commodity rates. Articles are classified, *i. e.*,

given ratings such as, say, fourth class in less-than-carload shipments and fifth class in carloads; carload minima are usually stated, and there are rules and regulations governing packing, mixed carload shipments, and other matters.<sup>1</sup>

The Commission is disposed to encourage the making of class rates wherever practicable, because of their tendency to uniformity and stability.<sup>2</sup>

It is generally recognized that class rates on heavy commodities are made to move more or less limited shipments from place to place, and commodity rates to move large, steady shipments.<sup>3</sup>

It is well understood that in the absence of commodity rates shipments are made at class rates.<sup>4</sup>

Commodity rates are ordinarily lower than class rates. The class rates, therefore, afford a reasonable test for measuring the general level of the commodity rates.<sup>5</sup>

In the case of the *United States Leather Company v. Southern Railway Company*,<sup>6</sup> the Interstate Commerce Commission said: "From a transportation standpoint leather is desirable freight. The loading from those southern tanneries averages about 35,000 pounds per car. The liability to damage is extremely slight, no special expedition in its movement is required. The movement itself is uniform throughout the year. The average cost of handling leather is probably below that of freight in general.

"Leather is, however, a valuable article. The invoice price of a carload like those shipped from the tanneries of the complainants ranges from seven to ten thousand dollars per car. In official, western, and southern classifications leather is rated fourth class in carloads, second class in less than carloads, and considering its value it can hardly be said that the classification is too high. Now, the advanced rates even are less than the class rates between the points in question, and the defendants insist that this shows that the former rates were improper and justifies the increase.

"It may be noted *in limine* that upon this theory the advanced rates can not be defended, for those rates are less than the class rates, and if it be true that there is a fixed relation between commodities which must be the same in all cases and that the classification determines that relation, then it would be the duty of these defendants to advance these leather rates to the level of the class rates.

"It may be further noted that upon this theory no commodity rate could be justified. While it is true that commodity rates are always in the nature of a preference, not necessarily undue, and while it may be true that the tendency should be to eliminate these special rates and work more nearly to a class basis, still the rates of this country have been built upon a different theory, and to apply that theory would be revolutionary and destructive of legitimate business enterprises."

In speaking of the establishment of a common percentage relationship between class rates, the Commission has said:<sup>7</sup> "The Commission has long realized the desirability of establishing some common percentage which all classes should be to the first-class rate, so that the naming of the first-class rate would automatically fix that of every

other class. It has not felt free, up to the present time, to establish such a percentage for use in all parts of the country. The rates established by the carriers themselves present endless and very wide differences in the relation between the classes. To apply the same percentage relation in every part of the country would be to throw out of proportion the rates prescribed by the Commission as compared with other rates in effect in that territory, and, therefore, to create confusion and discrimination instead of securing uniformity and equal treatment.

"The rates made by many State Commissions and by the carriers themselves, vary not only between different schedules but for different distances in the same schedules; that is, the relation between the different classes for 100 miles is not the same as for 200 or 300 miles."

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1. First Annual Report of I. C. C. (1887); La Crosse Merchants & Jobbers' Union v. Chicago M. & St. P. Ry. Co. (1888), 1 I. C. C. Rep. 629, 2 I. C. Rep. 9; Railroad Commission of Louisiana v. Aransas Harbor T. Ry. Co. (1918), 48 I. C. C. Rep. 312, 369.
  2. Acme Cement Plaster Co. v. Lake Shore & M. S. Ry. Co. (1909), 17 I. C. C. Rep. 30, 35.
  3. James & Abbott Co. v. Boston & M. Rd. Co. (1909), 17 I. C. C. Rep. 273, 275.
  4. Standard Mirror Co. v. Pennsylvania Rd. Co. (1913), 27 I. C. C. Rep. 200, 203.
  5. In Re Rate Increases in Official Classification Territory (1914), 31 I. C. C. Rep. 351, 401.
  6. United States Leather Co. v. Southern Ry. Co. (1911), 21 I. C. C. Rep. 323, 325.
  7. Iowa State Board of Railroad Commissioners v. Arizona E. Rd. Co. (1913), 28 I. C. C. Rep. 563, 565.

#### 600-H. COMMODITY RATES.

Commodity rates are usually, if not invariably, lower than the class rates, being special rates presumably established on account of peculiar circumstances and conditions.<sup>1</sup> The general policy of the carriers is to make commodity rates somewhat lower than class rates on commodities, the movement of which is regarded as necessary to the development of mercantile interests and industries.<sup>2</sup> Commodity rates are in essence exceptions to the classification based upon a belief in the economic expediency of such course.<sup>3</sup> Nevertheless commodity rates are special rates which ought to be made with reference to all the conditions surrounding the transportation of the particular article between the particular points.<sup>4</sup>

Commodity rates are ordinarily published to aid the movement of traffic, which, because of special or peculiar conditions, will not move freely under the class rates. The commodity rate should be fixed with a view to securing an unrestricted movement and without regard to the class rates. Given commodity rates under consideration should be considered with reference to their reasonableness and not in their relation to the class rates, and in establishing commodity rates carriers frequently must take into consideration the peculiar requirements of particular communities and must meet those requirements by applying on certain commodities rates that are lower than would otherwise be deemed necessary.<sup>5</sup>

Commodity rates are usually made upon coarse, cheap articles which are not of sufficient value to bear the numbered class rates. For example, they are made on iron articles, brick, lumber, clay, cement, stone, salt, coal, etc.<sup>6</sup> The factors of value and volume of tonnage are important to be considered in determining the advisability and necessity of establishing a commodity rate.<sup>7</sup>

Where a commodity rate is made for a manufactured product, capable of classification, a certain equilibrium between competing points of manufacture should be preserved, if possible, and only some peculiar circumstances or conditions can warrant the maintenance of a commodity rate from a few points of manufacture in a limited locality, while the class rate basis as to the same commodity is maintained from all other points of manufacture.<sup>8</sup>

Commodity rates as a rule are not as stable as class rates. The only purpose of making a commodity rate is to take the commodity out of the classification; therefore, where there is both a class and a commodity rate contemporaneously in effect, the commodity rate is the lawful rate to be applied and if the carrier does not desire to apply it on all shipments it must be cancelled.<sup>9</sup>

The Commission discourages the establishment of commodity rates on account of their lack of uniformity and stability. It is only in cases where it clearly appears that the inclusion of a given article in a class results in unreasonable charges, and a lower rate will not meet the demands of justice, that commodity rates are required to be established.<sup>10</sup>

In every instance where a commodity rate is named in a tariff upon a commodity and between specified points such commodity rate is the lawful rate and the only rate that may be used with relation to that traffic between those points even though a class rate or some combination may make lower. The naming of a commodity rate on any article or character of traffic takes such article or traffic out of the classification and out of the class rates between the points to which such commodity rate applies.<sup>11</sup>

The establishment of a commodity rate upon any article removes that commodity from the classification, but a commodity rate is to be applied strictly; it cannot be applied upon analogous articles, and it would seem to follow that only the article or articles clearly comprehended within the descriptive terms of the commodity rate can be considered as having been so removed from the classification.<sup>12</sup>

It should be noted, however, that while a commodity rate may be a *different* rate from a class rate, it does not necessarily follow that it must be a lower rate, nor is it obligatory upon the carrier to thereby establish a lower rate.<sup>13</sup>

The very purpose of a commodity rate is to remove the commodity from the classification for special treatment, which could not be accorded to it at all, or only with difficulty, under the classification. The classification generally imposes the highest rate which a particular commodity should bear under normal conditions. A commodity which is higher than the class rate is an abnormality which on its face requires special justification.<sup>14</sup> In the last analysis the presumption that a commodity rate higher than the class rate which would otherwise apply is unreasonable is predicated on the antecedent presumption that the class rate is fixed at the highest reasonable figure.<sup>15</sup> Although a commodity rate in excess of the class rate is regarded as unusual, special circumstances and conditions may justify such a departure from the general rule. This is especially true in the case of a commodity

rate which applies from and to a number of points that are grouped or blanketed. It might exceed that class from one or more points in the blanket and still be reasonable.<sup>16</sup> In the absence of other evidence that a rate is unreasonable or discriminatory, the fact that a commodity rate bears a moderately greater or less proportion to a corresponding class rate is not a sufficient ground for condemning the commodity rate as unreasonable or discriminatory.<sup>17</sup>

The fact that for a long time there has been no movement of a particular commodity is no justification for the maintenance of an unreasonable rate; neither is the probable effect of state prohibitory laws upon the tonnage.<sup>18</sup>

A showing that the commodity rate on a particular article is a less proportion of the corresponding class rate than that on certain other articles is no more justification for an increase in the commodity rate on that particular article than a showing that the commodity rate on another article is a greater proportion of the corresponding class rate is a justification for reducing the commodity rate on that article. When a commodity rate is established, it is presumed to be the result of special circumstances and conditions surrounding the movement of the particular article between particular points—circumstances and conditions that do not inhere in or apply to the movement of the same articles or other articles between all points. The contention that a commodity rate should bear a fixed, different, or any relation whatever to the corresponding class rate overlooks the fact that the article, on which the commodity rate applies has been removed from the classification and from its association with or relation to other articles, so far as the movement between certain points is concerned.<sup>19</sup>

The Commission has stated that it cannot subscribe to the contention that the state of relativity between commodities which features the classification as the real foundation of its structure must necessarily extend to commodity rates. As a matter of fact, the reason why a commodity rate is established is that conditions require a departure as to the particular article from this very plan of grouping together certain articles. Those exceptional conditions do not necessarily apply to all commodities; otherwise the class rate would give way entirely to the commodity rate. Nor is this idea of classification relationship necessarily to be followed as between carload and less-than-carload commodity rates on the same articles. Conditions may demand a departure from the classification basis as to carload and not as to less-than-carload traffic, as apparently has been the case even with respect to cereal products, which move on the class rates in less-than-carloads.<sup>20</sup>

Commodity rates are established to meet special conditions and because of special considerations which are not met by or reflected in classifications or subclassifications. Those conditions may change. The consideration may gain or wane in compelling force. But so long as they are potent they find expressions in exceptions to that uniformity and symmetry of rates which should characterize a classified system.<sup>21</sup> A commodity rate applicable to less-than-carload traffic is a pronounced departure from the usual practice and the Commission should require its establishment only upon a clear showing of compelling reasons.<sup>22</sup>

If a commodity rate is established between certain points on a particular article which ordinarily moves under class rates in the territory in which such points of origin and destination are located, it is presumed to be the result of special circumstances attending the transportation of that article between such points.<sup>23</sup>

In the establishment of rates on a single commodity the fact that the carriers are operating at a loss or on a narrow margin of profit should not be given too much weight, unless it clearly appears that the particular commodity constitutes the bulk of the traffic transported.<sup>24</sup>

It cannot be said that a commodity rate must bear a fixed relation to the corresponding class rate, even as between competing points.<sup>25</sup>

The reasonableness of commodity rates is not dependent solely upon regularity of movements.<sup>26</sup>

1. Indianapolis Freight Bureau v. Cleveland C. C. & St. L. Ry. Co. (1909), 15 I. C. C. Rep. 367; Goerres Cooperage Co. v. Chicago M. & St. P. Ry. Co. (1911), 21 I. C. C. Rep. 5, 6.
2. Railroad Commission of Nevada v. Southern P. Co. (1910), 19 I. C. C. Rep. 238, 255.
3. Railroad Commission of Nevada v. Southern P. Co. (1911), 21 I. C. C. Rep. 329, 332.
4. State of Iowa v. Atchison T. & S. Ry. Co. (1913), 28 I. C. C. Rep. 47, 63.
5. In Re Des Moines Commodity Rates (1915), 34 I. C. C. Rep. 281, 284.
6. New York Board of Trade & Transportation v. Pennsylvania Rd. Co. (1891), 3 I. C. Rep. 417, 4 I. C. C. Rep. 447.
7. Tone Bros. v. Illinois C. Rd. Co. (1913), 26 I. C. C. Rep. 279, 281; Heldmaier v. Chicago I. & L. Ry. Co. (1918), 49 I. C. C. Rep. 81.
8. In Re Westbound Lake-and-Rail Knit Goods Commodity Rates (1914), 32 I. C. C. Rep. 54, 57.
9. Conf. Rul. Bul., Rule 84 (June 9, 1908).
10. Acme Cement Plaster Co. v. Lake Shore & M. S. Ry. Co. (1909), 17 I. C. C. Rep. 30, 35.
11. Tariff Circular 18-A, Rule 7 (a); Central California Traction Co. v. Chicago M. & St. P. Ry. Co. (1912), 24 I. C. C. Rep. 550, 551; Pecos & N. T. Ry. Co. v. Porter (Texas 1913), 156 S. W. 267, 272.
12. Crombie & Co. v. Southern P. Co. (1912), 25 I. C. C. Rep. 233, 235.
13. Wheeling Corrugating Co. v. Baltimore & O. Rd. Co. (1910), 18 I. C. C. Rep. 125; Chamber of Commerce, Houston, Texas v. International & G. N. Ry. Co. (1914), 32 I. C. C. Rep. 247, 255; Heldmaier v. Chicago I. & L. Ry. Co. (1918), 49 I. C. C. Rep. 81.
14. Rock Spring Distilling Co. v. Illinois C. Rd. Co. (1914), 29 I. C. C. Rep. 18, 26, et seq.
15. New Orleans Vegetable Growers, Merchants & Shippers' Ass'n v. Illinois C. Rd. Co. (1915), 34 I. C. C. Rep. 32, 34, cited Rath Packing Company v. Director General, Illinois C. Rd. Co. (1920), 59 I. C. C. Rep. 427, 428.
16. In Re Rice Rates from Helena, Ark. (1914), 31 I. C. C. Rep. 614, 615.
17. Decker & Sons v. Chicago M. & St. P. Ry. Co. (1914), 30 I. C. C. Rep. 547, 551. Cited in Greater Des Moines Committee, Inc. v. Director General, Chicago, M. & St. P. Ry. Co. (1920), 60 I. C. C. Rep. 403, 404.
18. Scheuing v. Louisville & N. Rd. Co. (1911), 20 I. C. C. Rep. 550.
19. Western Trunk Line Rate Increases (1917), 43 I. C. C. Rep. 481, 489; Northern Potato Traffic Association v. Chicago & A. Rd. Co. (1917), 44 I. C. C. Rep. 426, 430.
20. National Association of Macaroni and Noodle Mfrs. of America v. Alabama G. S. Rd. Co. (1918), 50 I. C. C. Rep. 289, 292.
21. Public Utilities Commission of the State of Colorado v. Atchison T. & S. F. Ry. Co. (1919), 52 I. C. C. Rep. 439, 448, citing Decker & Sons v. Chicago M. & St. P. Ry. Co. (1914), 30 I. C. C. Rep. 547, 551; Samuel v. Director General, as Agent, Philadelphia & R. Ry. Co. (1920), 59 I. C. C. Rep. 190, 191.
22. Public Utilities Commission of the State of Colorado v. Atchison T. & S. F. Ry. Co. (1919), 52 I. C. C. Rep. 439, 477, citing Decker & Sons v. Chicago M. & St. P. Ry. Co. (1914), 30 I. C. C. Rep. 547, 551.
23. Porter Mirror & Glass Co. v. Director General, as Agent, St. Louis S. F. Ry. Co. (1920), 59 I. C. C. Rep. 308, 311.
24. Holmes & Hallowell Co. v. Great N. Ry. Co. (1921), 60 I. C. C. Rep. 687, 702.
25. Quinton Spelter Co. v. Fort Smith & W. Rd. Co. (1921), 61 I. C. C. Rep. 43, 44.
26. Swift & Co. v. Director General, as Agent, (1921), 62 I. C. C. Rep. 618, 623.

**600-I. RATES FOR MIXED SHIPMENTS.**

Class rates or commodity rates may be made for specified mixed shipments and will be the lawful rates for such mixture, even though certain points of the mixture are covered by class or commodity rates when shipped separately.<sup>1</sup>

The practice of shipping mixed cars is of value to the carrier in that it results in a heavier loading of the car and in fewer claims for loss and damage; it is also of value to the shipper in that they receive upon less-than-carload shipment the benefit of the carload rate; it also involves a more expeditious service, and the goods arrive in better condition; it enables the retailer also to do a larger volume of business on a smaller investment.<sup>2</sup>

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1. Tariff Circular 18-A, Rule 7 (a).

2. Furniture Manufacturers Ass'n of Grand Rapids v. Ann Arbor Rd. Co. (1915), 34 I. C. C. Rep. 262, 265.

**600-J. RAIL-AND-WATER RATES.**

“All-rail” means a movement entirely by rail.<sup>1</sup> “Lake-and-rail” means a movement partly by rail and partly by lake boats, which involves break of bulk.<sup>2</sup> “Rail-lake-and-rail” means a movement by rail to the lake, by boat to another lake port and from thence by rail, which involves breaking bulk twice.<sup>3</sup> “Across-lake” means a movement by rail to the lake and across the lake by car ferry without break of bulk.<sup>4</sup> “Across-lake-and-rail” means a movement by rail and car ferry to the western lake port and from thence by rail, which may or may not involve breaking bulk.<sup>5</sup>

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1. Escanaba Business Men's Ass'n. v. Ann Arbor Rd. Co. (1912), 24 I. C. C. Rep. 11, 12.

2. Ibid.

3. Ibid.

4. Ibid.

5. Ibid.

**600-K. “PAPER” RATES.**

“Paper” rates are simply rates which have been regularly established and duly published in legal tariffs, but under which there is no movement of traffic. This does not mean necessarily that the rates are so high as to be prohibitive to the movement of traffic. It may be that the rates were established primarily to accommodate a particular movement, and the traffic having moved the reason for their continuance disappears, or else, the rates may have been established by the carriers without reference to any particular movement of traffic or possibility thereof. In the latter instance, however, the publication of such special rates would be done by inadvertence rather than intentionally as special rates are seldom established in the first instance without reference to the existence of tonnage. From the nature of things, the term “paper” rate applies to special commodity rates. In the establishment of a special rate on a given commodity between certain points, the carriers do not publish relative rates between all other points served by their lines, inasmuch as if this method of rate making were pursued to a logical conclusion the major portion of the rate carried in the tariff would be “paper” rates or nominal rates under

which there would be no movement or possibility of movement of traffic. The burden arising from the expense and uselessness from such a method of tariff compilation is obvious.

Although many rates published in carriers' tariffs are "paper" rates on which no business moves, yet carriers ask for authority to continue their publication and to be allowed to apply such rates should business be obtained by them. It is the duty of the Commission, therefore, to pass upon their application.<sup>1</sup>

A railroad company is not required to publish a rate from a certain mine upon a particular grade of coal, where the mine produces nothing which could be shipped under that rate.<sup>2</sup>

To whatever extent long previous existence of lower rates in actual use may justify an inference or presumption that they are sufficiently high, the mere publication of such rates in the general schedule, when they have not been used, is not conclusive proof that they are reasonably remunerative to the carrier.

While a discriminatory tariff may not directly injure a locality against which it discriminates so long as there is no actual movement of traffic, it may be a sort of indirect injury by discouraging prospective industry, and should therefore be brought to conform to the law.<sup>4</sup>

A mere "paper" rate, which was never carried into effect, cannot be availed of as a basis to recover damages on the theory that such rate was unjustly discriminatory.<sup>5</sup>

In a proceeding based upon an infraction of section 4 of the act, a merely theoretical or "paper" rate that had not been used and was unknown to the carrier until casually discovered will not be accepted as affording a just basis for an order for reparation on shipments made to an intermediate point at a slightly higher rate.<sup>6</sup>

While the fact that traffic moves freely has some bearing upon the reasonableness of the rate, it is not true that merely because the traffic does not move, the rates are therefore unreasonable. The carriers are entitled to a reasonable compensation for the services they render; yet this compensation might require the establishment of rates upon which shippers could not do business at a profit, and in such a case the Commission could not lawfully prescribe rates unremunerative to the carriers.<sup>7</sup>

*In Re Investigation & Suspension of Advances in Rates on Potatoes from South Dakota and Other Points to St. Louis and Other Points,*<sup>8</sup> the Commission said: "The carriers show that for the last three years there has been but very little movement of potatoes from the territory of production in question to the Mississippi River and points east, the product of that territory having been mainly consumed in territory to the west of the river. We should not ordinarily require a maintenance of these rates if in point of fact no traffic was likely to move under them, but this can hardly be affirmed in the present instance. The territory from which these rates apply produces large quantities of potatoes. Whether they will or will not move east of the Mississippi River depends entirely upon the production of different parts of the

country. The state of the crop may be such that they will move in large quantities one season and possibly not at all for several succeeding seasons."

1. *In Re Rates on Tropical Fruits from Gulf Ports to Various Destinations* (1914), 30 I. C. C. Rep. 621, 631.
2. *McGrew v. Missouri P. Ry. Co.* (1901), 8 I. C. C. Rep. 630.
3. *Shield & Co. v. Illinois C. Rd. Co.* (1907), 12 I. C. C. Rep. 210.
4. *Kindel v. Atchison T. & S. F. Ry. Co.* (1903), 9 I. C. C. Rep. 606.
5. *Lehigh V. Rd. Co. v. Rainey* (1902), 112 Fed. Rep. 487.
6. *Missouri & Kansas Shippers Ass'n. v. Missouri K. & T. Ry. Co.* (1907), 12 I. C. C. Rep. 483.
7. *Railroad Commissioners of Florida v. Southern Express Co.* (1914), 28 I. C. C. Rep. 634, 635.
8. *In Re Investigation & Suspension of Advances in Rates on Potatoes from South Dakota and other points to St. Louis and other Points* (1912), 25 I. C. C. Rep. 247, 248.

#### 600-L. "MISSIONARY" RATES.

"Missionary" rates are rates which were originally established to aid in the development of a particular industry.<sup>1</sup>

1. *Fruits & Vegetables, I. & S. Docket No. 820* (1917), 43 I. C. C. Rep. 291, 319; *Rates on Lumber from Southern Points to the Ohio River crossings and Other Points* (1915), 34 I. C. C. Rep. 652, 659.

#### 601. Joint rates.

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##### 601-A. A JOINT RATE IS A MATTER OF AGREEMENT BETWEEN CONNECTING CARRIERS.

The question of joint through rates is a matter of agreement between connecting carriers, and they may or may not enter into such agreements as they may think their interests demand.<sup>1</sup>

However, it should be noted that this is subject to the power vested in the Interstate Commerce Commission by Section 15 of the Act, to establish through route and joint rates as the maximum to be charged, and prescribe the division of such rate when they may be necessary to give effect to any provision of the Act, and the carriers complained of having refused or neglected to voluntarily establish such through routes and joint rates.

Joint rates may be so divided between the carriers that each receives less than its established local rate, or so that the full local charge is secured by one or more of the carriers, the other party or parties accepting less than local rates; but whatever the basis of division, the essential feature of such rates is that the connecting carriers have agreed or mutually consented to carry traffic over the connecting line for a less aggregate charge than the sum of their established local rates.<sup>2</sup>

In the absence of some agreement or understanding with a connecting line, by which a joint tariff of rates is authorized, a given carrier cannot lawfully publish or apply any other rates than those which it fixes for transportation between points reached by its railroad; and the rates so fixed are the only lawful rates which such carrier can charge for any transportation service which it may perform.

whether the traffic carried is destined to points on its own road or to points on the line of some other carrier.<sup>3</sup>

A carrier which has published and filed its rates, as the law requires, may combine such rates with the lawfully established rates of a connecting carrier or carriers, and thus announce the aggregate amount for which traffic will be transported from points on its railroad to points on the line of such connecting carrier or carriers; but one carrier cannot lawfully add to the duly established rates of another carrier any amount it pleases less than its own local rates, and publish and use that sum as a rate to points on the line of such other carrier without its consent. Such a through rate is not a "joint rate," for joint rates can be made only by concurrence or assent; nor is it a combination rate, for one of its component parts has no legal existence or sanction as a separate or local charge; there must be lawful rates upon each of the roads before there can be a lawful combination of rates.<sup>4</sup>

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1. Southern P. Co. v. Interstate Commerce Commission (1906), 200 U. S. 536, 26 Sup. Ct. Rep. 330, 50 L. Ed. 585.
  2. New York, N. H. & H. Rd. Co. v. Platt, Receiver (1897), 7 I. C. C. Rep. 323.
  3. *Ibid.*
  4. *Ibid.*

#### 601-B. JOINT THROUGH RATES TO AND FROM PORTO RICAN PORTS.

The Commission has stated that without deciding whether Porto Rico is to be regarded as a Territory of the United States as that phrase is used in Section 1 of the Act, it will recognize the validity of joint through rates from points in the United States to a port or ports in Porto Rico when properly concurred in by the water carriers, as well as the validity of joint through rates from a port or ports in Porto Rico to points in the United States when likewise concurred in by the water lines.<sup>1</sup>

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1. Conf. Rul. Bul. Rule 201 (June 23, 1909).

#### 601-C. A CARRIER MAY NOT DENY THE BENEFIT OF A JOINT RATE TO MANUFACTURERS ON CONNECTING LINES IN ORDER TO FOSTER INDUSTRIES ON ITS OWN LINE.

An interstate carrier, in order to build up enterprises of the same character on its own line and to prevent the trade of its local industries from being displaced by the competition of manufacturers of the same commodities on connecting line, cannot deny to industries on the lines of such connections the benefit of through routes and joint rates; nor is the fact that the revenues of the carrier may be reduced by establishing such through routes and joint rates a material consideration. It may be laid down as a general rule admitting no qualifications for a manufacturer or merchant who has traffic to move and is ready to pay a reasonable rate for the services has the right to have it moved and to have reasonable rates established for the movement, regardless of the fact that the revenues of the carrier may be reduced by reason of his competition with other shippers in the distant markets; and he has the right also to have the benefit of through routes and reasonable joint rates to such distant markets if no "reasonable or satisfactory

or through" routes already exist. While the Commission's power to establish a through route and joint rate is limited to particular cases where a reasonable or satisfactory through route does not already exist, yet such power is not confined to cases where enforcements of the other provisions of the regulating statute is sought.<sup>1</sup>

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1. *Cardiff Coal Co. v. Chicago M. & St. P. Ry. Co.* (1908), 13 I. C. C. Rep. 460; Bill to annul Commission's requirement transferred to Commerce Court, *Chicago M. & St. P. Ry. Co. v. I. C. C.* (C. C. N. D. Ill.). Not reported; Case dismissed on motion on petition of carrier, *Chicago M. & St. P. Ry. Co. v. I. C. C.* (April 3, 1911), Commerce Court case No. 17. Not reported.

#### 601-D. PARTIES WHO ARE NOT COMPETENT IN LAW TO ESTABLISH JOINT RATES FOR INTERSTATE TRANSPORTATION.

Where a railroad company, stage line and hotel association joined together to form a through route and joint rates for the transportation of passengers from Eastern points to the Yellowstone National Park and for providing accommodations and stage transportation at such reservation, the Commission held, that such parties were not competent in law to form a through route and establish joint rates as provided in Section 6 of the Act to Regulate Commerce.<sup>1</sup>

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1. *Wylie v. Northern P. Ry. Co.* (1905), 11 I. C. C. Rep. 145; *Cary v. Eureka Springs Ry. Co.* (1897), 7 I. C. C. Rep. 286.

#### 601-E. A JOINT RATE ESTABLISHED VIA ONE ROUTE IS NOT APPLICABLE TO PROPERTY TRANSPORTED VIA ANOTHER ROUTE.

Section 6 of the act makes it unlawful for any common carrier, party to a joint tariff, to charge or receive a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any point as to which a joint rate, fare, or charge has been made thereon than we specified in the schedules on file and in force at the time. *Held*, that under this provision where a joint rate was established between terminals in different States, transportation of property between such terminals for a greater or less rate than that lawfully established was forbidden, not only when the property was carried over the established route, but when carried over any other route between the same terminals.<sup>1</sup>

Where an initial carrier has established with certain connecting carriers a through route and joint rate between points in different States, it cannot thereafter lawfully transport property between such points via a different route, over which no rate is published, at a less rate than that established for the through route.<sup>2</sup>

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1. *United States v. Pennsylvania Rd. Co.* (1907), 153 Fed. Rep. 625.
  2. *United States v. Vacuum Oil Co.* (1907), 153 Fed. Rep. 598.

#### 601-F. LEGAL STATUS OF A JOINT THROUGH RATE THAT EXCEEDS THE AGGREGATE OF INTERMEDIATE RATES.

See "*A joint through interstate rate which exceeds the aggregate of the intermediate rates, subject to the Act, is unlawful and non-enforceable*," Section 609-FF, post.

601-G. LEGAL STATUS OF A JOINT RATE THAT IS LOWER THAN THE COMBINATION OF LOCAL RATES.

In general, joint through rates are lower than the sum of the locals between two points, and obviously there can seldom be any transportation reason why such should not be the case.<sup>1</sup> Through rates, higher than combination of local charges, are extremely rare in railroad transportation, and those which have been brought to the attention of the Commission have only been approved when occasioned by extraordinary and peculiar circumstances. They have not been justified in any case by the fact of water or other competition at points of junction between the connecting carriers. The reason is plain. Ordinarily, through shipments are carried by connecting roads at rates *less* in amount than those of the combined locals, and, primarily, this is so because the necessities of commerce require it, and because it is commonly *less expensive* to the carriers to transport through traffic than to perform the services involved in two local shipments to and from some intermediate station; and it is hardly conceivable that the carriers' cost of through carriage can in any case be greater than that of supplying the two distinct local services.<sup>2</sup>

A through rate is not necessarily reasonable, however, because it does not exceed the aggregate of two reasonable local rates.<sup>3</sup>

As stated above, that the through rate should not exceed the sum of the locals is a doctrine well established, but it does not follow as a corollary that the sum of the locals should always be reduced to equal the through rate.<sup>4</sup>

The Commission has stated that it knows of no law, either common or statutory, under which the jobber is entitled to distribute commodities under as low or lower total freight rates as the through rates from point of origin to the point of destination.<sup>5</sup>

A joint rate may be less than the sum of the local rates or either of the locals in the through route.<sup>6</sup>

1. *Laning-Harris Coal & Grain Co. v. Missouri P. Ry. Co.* (1908), 13 I. C. C. Rep. 154; *Flaccus Glass Co. v. Cleveland, C. C. & St. L. Ry. Co.* (1908), 14 I. C. C. Rep. 333; *St. Louis Hay & Grain Co. v. Mobile & O. Rd. Co.* (1905), 11 I. C. C. Rep. 90; *St. Louis Hay & Grain Co. v. Illinois C. Rd. Co.* (1905), 11 I. C. C. Rep. 486; *New York, N. H. & H. Rd. Co. v. Platt, Receiver* (1897), 7 I. C. C. Rep. 323; *Coffeyville Vitrified Brick & Tile Co. v. St. Louis & S. F. Rd. Co.* (1907), 12 I. C. C. Rep. 498; *Savannah Bureau of Freight & Transportation v. Charleston & S. Ry. Co.* (1898), 7 I. C. C. Rep. 601.
2. *Hilton Lumber Co. v. Wilmington & W. Rd. Co.* (1901), 9 I. C. C. Rep. 17.
3. *Minneapolis & St. L. Rd. Co. v. State of Minnesota, ex. rel. Railroad and Warehouse Commission* (1901), 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. Rep. 900.
4. *Williams & Co. v. Vicksburg S. & P. Ry. Co.* (1909), 16 I. C. C. Rep. 482; *Crews v. Richmond & D. Rd. Co.* (1888), 1 I. C. Rep. 703, 1 I. C. C. Rep. 401.
5. *Ibid.*
6. *Parsons v. Chicago & N. W. Ry. Co.* (1894), 63 Fed. Rep. 903, 11 C. C. A. 489, 27 U. S. S. App. 394; *Affirmed Parsons v. Chicago & N. W. Ry. Co.* (1897), 167 U. S. 447, 17 Sup. Ct. Rep. 887, 42 L. Ed. 231.

601-H. LEGAL STATUS OF TARIFF CARRYING A JOINT RATE WHICH DOES NOT NAME A JUNCTION POINT.

In computing the rate for a shipment over connecting carriers, a tariff of the initial carrier, naming specific rates from designated

points to other designated points, which did not include a junction point, does not apply, but the rate is to be based on the local tariffs of the initial carrier.<sup>1</sup>

1. *Texas & P. Ry. Co. v. New Roads Oil Mill & Mfg. Co.* (1915), 221 Fed. Rep. 246.

**601-I. A JOINT RATE SHOULD NOT BE CANCELLED BECAUSE OF THE FAILURE OF INTERESTED CARRIERS TO AGREE UPON DIVISIONS THEREOF.**

The Commission has repeatedly adverted to the impropriety of the cancellation of joint rates because of the failure upon the part of the participating carriers to agree upon divisions. It is not just to the Commission to set its machinery in motion and to create a situation compelling a hearing and the making of a record only to develop the fact that there is such a controversy between the carriers. The proper course for carriers to pursue under such circumstances is to advise the Commission of their inability to agree upon divisions and to submit the matter to the Commission for adjustment.<sup>1</sup>

When carriers fail to agree upon the divisions of a joint rate the Commission may prescribe the proportions of such rate to be received by each carrier participating in such joint rate. See "*Jurisdiction of Interstate Commerce Commission over contracts, agreements and arrangements between carriers affecting traffic subject to the Act,*" Section 3602, post.

1. *In Re Coal from Toluca, Ill.* (1915), 37 I. C. C. Rep. 230.

**601-J. A COMBINATION RATE MAY NOT BE APPLIED UNTIL A JOINT THROUGH RATE IS CANCELLED.**

The Commission has ruled as follows:

"A mixed carload shipment moved under a joint mixed carload rate. There was also in effect at the time of the shipment a combination carload rate on the heavier weighed commodity in the mixture and a through less-than-carload rate on the lighter weighed commodity, which made a lower charge than that based on the joint mixed carload rate. The joint mixed carload had not been cancelled. Upon inquiry: *Held*, That a refund to the basis of the lower combination could not lawfully be made."<sup>1</sup>

The author cannot subscribe to this ruling of the Commission for the reason that it is the writer's opinion that any joint rate that exceeds the aggregate of the intermediate rates subject to the Act is unlawful within the meaning of the aggregate-of-intermediate-rates rule of the fourth section of the act. For full explanation of this view see "*Legal status of a joint through rate that is higher than the aggregate of the intermediate rates subject to the provisions of the Act,*" Section 711-B, post.

1. Conf. Rul. Bul. Rule 423 (June 5, 1913).

**601-K. DUTY OF CARRIERS TO ESTABLISH JOINT THROUGH RATES.**

Carriers are required to establish through routes, keep these routes open and in operation, furnish the necessary facilities for transportation, and make reasonable and proper rules of practice as between themselves and shippers.<sup>1</sup>

The establishment of through rates, generally speaking, tends to expand markets and facilitate trade. They have been required as a result of the numerous decisions of the Interstate Commerce Commission since the act was amended authorizing the Commission to exercise that power. The amendment in itself declares a public policy established by Congress which it is the duty of the Commission to protect and perpetuate.<sup>2</sup>

See "*Duty of carriers subject to the act to establish through routes, make reasonable rules and regulations for their operation, and furnish necessary facilities for transportation,*" Section 1100-D, post.

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1. St. Louis S. & P. Rd. Co. v. Peoria & P. U. Ry. Co. (1913), 26 I. C. C. Rep. 226, 234. The Commission has on a number of occasions referred to the well-recognized obligation resting upon carriers to transport property tendered. Merchants Freight Bureau of Little Rock v. Midland V. Rd. Co. (1908); 13 I. C. C. Rep. 243; Cedar Rapids & Iowa City Railway & Light Co. v. Chicago & N. W. Ry. Co. (1908), 13 I. C. C. Rep. 250; Cardiff Coal Co. v. Chicago N. & St. P. Ry. Co. (1908), 13 I. C. C. Rep. 460; Chamber of Commerce of Milwaukee v. Chicago R. I. & P. Ry. Co. (1909), 15 I. C. C. Rep. 460; Standard Lime & Stone Co. v. Cumberland V. Rd. Co. (1909), 15 I. C. C. Rep. 620; Cedar Hill Coal & Coke Co. v. Colorado & S. Ry. Co. (1910), 17 I. C. C. Rep. 479.
  2. Blakely Southern Rd. Co. v. Atlantic C. L. Rd. Co. (1913), 26 I. C. C. Rep. 344, 348.

**601-L. RIGHT OF CARRIER TO DEMAND INDEMNITY BEFORE CONCURRING IN THE ESTABLISHMENT OF A JOINT THROUGH RATE.**

A rail carrier would be justified, in cases where the connecting carrier does not possess proper resources, in demanding financial securities before entering into either joint-rate arrangements or accepting freight under proportional rates, the entire freight charges to be collected at destination.<sup>1</sup>

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1. Truckers Transfer Co. v. Charleston & W. C. Ry. Co. (1913), 27 I. C. C. Rep. 275, 279.

**601-M. UNREASONABLENESS OF A JOINT THROUGH RATE THAT EXCEEDS THE COMBINATION OF A LOCAL RATE AND AN UNDEFINED PROPORTIONAL RATE.**

See "*Unreasonableness of a joint through rate that exceeds the combination of a local rate and an undefined proportional rate,*" Section 609-GG, post.

**601-N. JOINT RATES TO AND FROM FOREIGN COUNTRIES.**

In *Ex Parte 74*,<sup>1</sup> covering Increased Rates, 1920, the Commission stated: "Nothing herein shall be construed as authorizing any increases in the proportions of through rates to or from points in foreign countries accruing in such foreign countries. The proportions of such rates accruing within United States may, however, be increased to the extent herein approved for domestic rates in the same territory."

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1. In the Matter of the Applications of Carriers in Official, Southern and Western Classification Territories for authority to increase rates Ex. Parte 74 (1920), 58 I. C. C. Rep. 220.

## 601-O. LIMITATION ON APPLICATION OF JOINT RATE.

In the case of *McGowin Lumber & Export Co. v. Director General, Southern Ry. Co.*<sup>1</sup> the Commission said: "The applicable tariffs authorized reconsignment at the through rate provided shipments moved over a route via which through rates and divisions were established. But whether divisions were established is immaterial, because the tariffs did not specify the routes over which divisions were in effect. In *Pole Stock Lumber Co. v. G. & S. I. R. R. Co.*, 26 I. C. C. 451, we stated that it was within the power of carriers by proper tariff provision to limit rates to routes over which there were agreed divisions. But a tariff provision which makes the application of rates over particular routes dependent upon the existence of divisions, without stating the routes with respect to which divisional arrangements are in effect, is indefinite and unlawful, and imposes uncertain and unreasonable conditions upon the shipper. *Markley & Co. v. A. C. L. R. R. Co.*, 42 I. C. C. 187. Nothing in the tariff would have precluded complainant from specifically routing the shipments through Louisville to Cincinnati by any of the three routes north of the Ohio River herein mentioned if it had billed the shipments to final destinations in the first instance. As said in *Van Dusen Harrington Co. v. C. M. & St. P. Ry. Co.*, 47 I. C. C. 59, 'if it was defendants' purpose to restrict the application of the joint rate to any particular route and the reconsigning privileges authorized in connection therewith to any particular point, it should have been done by clear and unequivocal language.' "

See "Right of shippers to use any through route available under the tariff rates," section 602-O, post, and "Routes and Routing," chapter 11, post.

1. *McGowin Lumber & Export Co. v. Director General, Southern Ry. Co.* (1920), 59 I. C. C. 238, 240; *Watters-Tong Lumber Co. v. Baltimore & O. Rd. Co.* (1920), 59 I. C. C. 229, 231; *Meeds Lumber Co. v. Director General, Alabama, T. & M. Rd. Co.* (1920), 59 I. C. C. Rep. 243, 244.

## 601-P. PARTICIPATION MERELY IN JOINT RATES DOES NOT MAKE CONNECTING CARRIERS PARTNERS SO AS TO MAKE THEM JOINTLY AND SEVERALLY RESPONSIBLE FOR UNJUST DISCRIMINATION.

In *Central Rd. Co. of N. J. v. United States*<sup>1</sup> the United States Supreme Court, per Mr. Justice Brandeis, stated: "It is urged that while the undue prejudice found results directly from the individual acts of Southern and mid-western carriers in granting the privilege locally, the appellants, as their partners, make the prejudice possible by becoming the instruments through which it is applied. Discrimination may, of course, be practised by a combination of connecting carriers as well as by an individual railroad; and the Commission has ample power under Section 3 to remove discrimination so practised. See *St. Louis Southwestern R. Co. v. United States*, 245 U. S. 136, 144, 62 L. ed. 199, 207, 38 Sup. Ct. Rep. 49. But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination; as where a lower joint rate is given to one locality than to another similarly situated. *Penn Ref. Co. v. Western New York & P. R. Co.*, 208 U. S. 208, 221, 22, 225, 52 L. ed. 456, 462,

463, 28 Sup. Ct. Rep. 268. Compare *East Tennessee, V. & G. R. Co. v. Interstate Commission*, 181 U. S. 1, 18, 45 L. ed. 719, 825, 21 Sup. Ct. Rep. 516. If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers. If that rule should prevail, only uniformity in local privileges and practices, or the cancellation of all joint rates, could afford to carriers the assurance that they were not in some way violating the provisions of Section 3. What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, facilities, and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act 1920, February 28, 1920, nor any earlier amendatory Legislation, has changed, in this respect, the purpose or scope of Section 3. Reversed."

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1. Central Rd. Co. of N. J. v. United States (1921), 66 L. Ed. 91, 94, ——U. S.—, ——Sup. Ct. Rep. ——.

## 602. Through Rates.

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### 602-A. ONLY ONE LEGAL RATE CAN EXIST BETWEEN ANY TWO POINTS AT ANY GIVEN TIME.

The Commission has held that there can be but one legal rate between two points—a very simple enunciation of a fundamental principle. This rate must be (a) the local rate if over one road, or (b) the joint rate over a through route composed of two or more roads which have agreed to a joint rate, or (c) a combination of separately established rates applicable on through business over a through route which does not enjoy a joint rate.<sup>1</sup>

Two or more connecting carriers may establish a joint rate only upon notice of thirty days or under special permission. A joint rate, when duly established and in force, becomes the only lawful rate for through transportation.<sup>2</sup>

A joint rate from point of origin to destination of a shipment is the lawful rate applicable to that movement whether the rate be confined to the line of one carrier or be a joint rate applying over the lines of two or more carriers.<sup>3</sup>

A specific through rate is the lawful rate for a through shipment, even though some combination of rates may make lower, and the carrier may not charge the higher through rate upon one shipment and the lower combination rate upon another shipment of the same kind between the same points at the same time.<sup>4</sup>

The practice on the part of carriers of accepting and transporting through shipments, as to which no joint rate applies, upon rates made up by combination of the rates of the several carriers participating in the movement, and of collecting, as delivering carriers, the aggregate charges of the several carriers upon such shipments, and of accounting to such carriers for their several portions of such charges, is practically universal. That custom has the same binding effect as a joint rate, both as between carriers themselves and as between carriers and shippers. Therefore, carriers may apply to through shipment rates

to and from points to and from which there is no applicable published joint rate, by using lawfully published bases, locals and proportionals in connection with other lawfully published tariffs.<sup>5</sup>

A through rate is a unit from point of origin to destination even though it is made up of separately established rates.<sup>6</sup>

In the case of *Horton v. Tonopah & G. R. Co.*<sup>7</sup> the Court said: "A merchant doing business in distant localities is entitled to know before he ships his goods what the freight charges will be. With this information he can decide whether to make the shipment or not. If it were permissible to change the rate on such a consignment after the shipper had parted with his possession, a serious and wholly unnecessary element of uncertainty and hazard would be introduced into the business.

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"Unquestionably the schedule of transportation rates filed with the Interstate Commerce Commission, posted and published in conformity with the statute, together with the waybill and the fact that the lumber was shipped, constitute a contract. It is an agreement to perform a certain amount of service for a definite compensation. Any change therein after the transportation begins, without the consent of both parties, would be unjust. With respect to such contracts the Interstate Commerce Commission has repeatedly said that changes in the schedule of rates will not be permitted to retroact on freight movements commenced before the change was made.

"The contract was entire and indivisible, so much so that, if through any act of the shipper the shipment was not completed, the carrier was entitled to his full charges; and by issuing the bill of lading the carrier binds itself to deliver the goods at their destination."

The purpose of Congress in the enactment of the Elkins Law was to secure uniform freight rates to all shippers, and its provisions are violated by the giving or receiving of any rebate or concession whereby any property shall be transported at a less rate by any interstate carrier than that named in the tariffs published and filed by such carrier, whether by direct agreement between shipper and carrier or indirectly by "any device whatever"; and whether a railroad company has published and filed a schedule of rates on interstate shipments to points beyond its own line said section applies to such rates equally with those between points on its own road.<sup>8</sup>

Through shipments of iron pipe were made from points in New Jersey and Pennsylvania to Winnipeg, Canada, part over the Baltimore & Ohio Railroad and part over the Philadelphia & Reading to the Great Lakes; thence by the Mutual Transit Company, a water carrier, to Duluth; and thence by the Great Northern Railway and its connections. There was no through joint rate published or filed, but there was a joint rate of 24½ cents per 100 pounds between the initial points and Duluth established and filed by participating carriers, and one of 25 cents per 100 pounds between Duluth and Winnipeg filed by the Great Northern Railway Company. Held, That the lawful rate for the through carriage was the sum of such two rates, or 49½ cents per 100 pounds, and that under the interstate commerce law neither line

over which the shipments passed could lawfully charge a greater or less sum than was specified in the filed and published schedule of rates to which it was a party.<sup>9</sup>

When a complaint involves charges applicable to a through shipment the through rate or charge must be brought in issue and the participating carriers must be made defendants. When the through rate or charge is made up of separately established rates of charges, applicable to the through business, the through rate or charge must be attacked as violative of the act, although the violation may be believed to be occasioned by a particular factor or factors thereof; in such case the complainant should be prepared at the hearing to prove the unlawfulness of the through rate itself and that this is due to a particular factor or factors.<sup>10</sup>

Proportional rates are necessarily parts of through rates and differ from local rates used as parts of through rates in that before the proportional rate may be attacked at all there must be an allegation that the through rate is unreasonable because of the unreasonableness of the particular proportional rate; whereas local rates, *as such*, may be attacked separately when used separately.<sup>11</sup>

Proportional rates *as such* may not be attacked as unreasonable or otherwise in violation of the act unless the through rates are also attacked, whether there be a claim for reparation or not, for even in cases where reparation is not demanded the proportional rate could not be considered by itself, as it is necessarily always a part of a through rate and can not be used alone.<sup>12</sup>

Local rates, however, when used as parts of through rates partake of the nature of proportional rates, and may be regarded as, in effect, local and proportional rates. So far as rates are strictly local they may be brought in question without questioning the propriety of any other rate; in so far as they are used in through transportation they should be treated as other proportional rates and may not be considered unless the through rates be attacked as a whole.<sup>13</sup>

1. *Laning-Harris Coal & Grain Co. v. Missouri P. Ry Co.* (1908), 13 I. C. C. Rep. 154.
2. Rule 55, Tariff Circular 18-A.
3. *Ibid.*
4. *Morgan v. Missouri, K. & T. Ry. Co.* (1907), 12 I. C. C. Rep. 525.
5. Rule 5, a, Tariff Circular 18-A.
6. *Commercial Club of Omaha v. Anderson & S. R. Ry. Co.* (1913), 27 I. C. C. Rep. 302, 318; cited, *People's Fuel & Supply Co. v. Grand Trunk W. Ry. Co.* (1914), 30 I. C. Rep. 657, 659. See also *Poehlman v. Chicago, M. & St. P. Ry. Co.* (1914), 30 I. C. C. Rep. 89, 92.
7. *Horton v. Tonopah & G. Rd. Co.* (1914), 225 Fed. Rep. 406, 410.
8. *United States v. Standard Oil Co.* (1907), 148 Fed. Rep. 719.
9. *United States v. Wood* (1906), 145 Fed. Rep. 405.
10. *Stevens Grocer Co. v. St. Louis, I. M. & S. Ry. Co.* (1916), 42 I. C. C. Rep. 396, 398, citing *Commercial Club of Omaha v. Atchison, T. & S. F. Ry. Co.* (1913), 27 I. C. C. Rep. 302; *Scott-Mayer Commission Co. v. Chicago, R. I. & P. Ry. Co.* (1913), 28 I. C. C. Rep. 529; *Poehlman Bros. Co. v. Chicago, M. & St. P. Ry. Co.* (1914), 30 I. C. C. Rep. 89.
11. *Stevens Grocer Co. v. St. Louis, I. M. & S. Ry. Co.* (1916), 42 I. C. C. Rep. 396, 398, citing *State of Iowa v. Chicago, St. P. M. & O. Ry. Co.* (1913), 28 I. C. C. Rep. 64.
12. *Stevens Grocer Co. v. St. Louis, I. M. & S. Ry. Co.* (1916), 42 I. C. C. Rep. 396, 398.
13. *Ibid.*

602-B. THE LEGAL RATE APPLICABLE TO AN INTERSTATE SHIPMENT IS THE PUBLISHED THROUGH RATE IN EFFECT AT THE TIME THE SHIPMENT IS RECEIVED BY THE CARRIER FOR TRANSPORTATION AND OVER THE ROUTE WHICH IT IS TO MOVE.

In case a shipment has been made over two or more railroads which have not, as to the journey the shipment is to take, filed with the Commission a notice of through route and joint rate, as required by section 6 of the Act to Regulate Commerce, does the shipment take the sum of the local rates of the various lines over which it is moved, as such locals may be established at the time it is received by the initial carrier, or is it subject to changes in locals which may be made before the shipment reaches the lines making such changes? That is to say: a shipment is made over the A line to a connection with the B line, and thence over the B line to destination. The B line changes its locals after the shipment is billed at the point of origin, but before it was passed beyond the A line. Is the shipment subject to such change in rate of the B line, or does it move under rates in effect at the time it began its journey?

A careful consideration of all the factors entering into this problem shows that, in the last analysis, the answer must depend upon a question of fact, this question being: Have the carriers over whose lines the shipment is to move made an arrangement, express or implied, for a through route? If a through route has been so formed, then the rate charged must be a through rate, and the shipment will move upon the rate existing at the time it is billed. If, however, no through route has been formed, then the shipment will move, not upon one through journey, but upon a succession of journeys, and will be subject to any change in rates made by any carrier into whose possession the shipment has not been received.

It needs no citation of authorities to prove that, at common law, a carrier may confine its business entirely to its own line. It need not make its line part of any through route to or from a point off its line unless it so chooses. As was pointed out by the United States Supreme Court in *Atchison, T. & S. F. Ry. Co. v. Denver & N. O. Rd. Co.*,<sup>1</sup> a carrier might, if it so pleased, receive freight from other carriers at any junction point in precisely the same capacity that it would receive freight from a wholesale house or other shipper doing business at such junction point. In such case, under the common law, its rates would apply as on the date of its billing, rather than upon the date of the billing by a connecting line.

There is no question that, where a joint rate has been made, and filed as such, over any through route, such rate takes effect as one charge, and shipments must be carried through on the rate in force at the time of the billing.

There may, however, be through routes without joint rates. A joint rate is simply a through rate, every part of which has been made by express agreement between the carriers making the through route. The joint rate is a rate over a through route, but it is not the only through rate recognized by the Act and the decisions.

Among the important amendments made in 1906 to the Interstate Commerce Act was that which makes it the duty of every carrier sub-

ject to the Act "to establish through routes and just and reasonable rates applicable thereto." (Sec. 1.) It is not necessary here to attempt to discover the full force of these words. Their significance, however, is not to be grasped without consideration of that latter portion of the Act (Sec. 6) which expressly recognizes the possibility of a through route without a joint rate, and which, after directing the publication and filing of local rates and of joint rates, provides for still other rates in the following language: "*If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection as aforesaid the separately established rates, fares, and charges applied to the through transportation.*"

The reasons for this rule are at least two: (1) The policy of the law that every route and every service shall have a published rate equally known and equally available to all patrons of the carriers; and (2) the policy of the law that carriers otherwise not subject to the Act shall be, when participating in interstate business, subject to the Act to Regulate Commerce.

A through route is a continuous line of railway formed by an arrangement, express or implied, between connecting carriers. It must have a rate for every service it offers, and, as the route is a new unit—one line formed by two or more connecting lines—so its rate for every service is a unit, even though it be divided between the several carriers arranging themselves into the through route. As was said by the Commission in *Brady v. Pennsylvania R. Co.*,<sup>2</sup> "Through carriage implies a through rate." This is equally true whether the through rate be published as a whole by the joint action of the connecting carriers, or in the absence of a joint agreement, be published in portions by the several carriers. The through route being one, a charge for a service over it is a charge for a single service, all the terms of which must be fixed at one and the same time; that is, at the time the initial carrier enters into the engagement for the service. The rate is either a joint through rate, made by arrangement by the parties to the through route, or it is a combination through rate consisting of "the separately established rates, fares and charges applied to the through transportation." This sum, however, is a single rate for a single service, and a contract for through transportation is a contract for transportation at the through rate, whether jointly or separately established, in force at the time the shipment is billed.<sup>3</sup>

Tariffs cannot be given a retroactive effect; they cannot be made to apply to conditions other than those existing upon the date when such tariffs become effective. A combination through rate is as binding, definite and absolute as a joint through rate; and all of the conditions, regulations and privileges obtaining as to any factor in such combination rate for through shipment, at the time of initial shipment upon such combination through rate, must be adhered to, and cannot be varied as to that shipment during the period of transportation of such shipment to its final destination.<sup>4</sup>

In a given case, freight was received by a carrier, and bills of lading were issued therefor on December 21 and 29, 1908. The freight was actually moved on January 1, 1909, on which date a lower rate went into effect. *Held*, That the rate in effect on the date the carrier received the property for transportation is the lawful rate.<sup>5</sup>

We therefore have the following rule:

"If no specific rate from point of origin to destination of a through shipment is provided, and no specific manner of constructing combination rate for it is prescribed, the lowest combination of rates applicable via the route over which the shipment moves is the lawful rate for that shipment."<sup>6</sup>

"Such combination through rate must be treated as a unit from the date of original shipment to the date of its arrival at destination, and the rate applied must be the combination of the rates which exist upon the date of original shipment. All of the conditions, regulations and privileges obtaining as to any factor in such combination rate for through shipment, at the time of original shipment upon such combination through rate, must be adhered to, and cannot be varied as to that shipment during the period of transportation of such shipment to its final destination. A local or proportional rate 'in' cannot be absorbed, diminished or affected by any 'out' rate not in effect at the time when the traffic moved upon such local or proportional rate."<sup>7</sup>

A through freight rate duly filed by the initial carrier with the Interstate Commerce Commission became on its effective date the lawful through joint rate, and the only one which the connecting carrier might lawfully receive or the shipper properly pay, where such connecting carrier received the new tariff and stamped and filed it, and, without giving any formal notice to the initial carrier of its acceptance, which was not at that time required by the Interstate Commerce Commission, acted upon such tariff, insisting that the new rate was the legal one, although it permitted a shipper to make payments at the old rate.<sup>8</sup>

While reconsignment is, as a general rule, associated with the application of a specific through rate, which is often less than the sum of the intermediate rates in and out of the point of original destination, and largely derives its value from that fact, this rule is not without exception. Not infrequently shipments are reconsigned on basis of the sum of the local rates, under authority of tariffs which provide for reconsignment at the through rate, and this may be done without violation of such tariffs, for the reason that no specific through rate from the point of origin to the new destination is in effect. The through rate in such cases is made by combining two or more rates instead of by the use of a single rate factor, but the reconsignment rules and charges apply to the same extent as if a specific through rate were in force. In one instance where that situation existed the Commission decided that the facts did not justify it in holding as unlawful a reasonable reconsignment charge.<sup>9</sup>

Upon inquiry as to whether a through distance tariff rate should be applied in cases where a combination rate made up of a rate to an intermediate point and a distance tariff rate beyond, makes a lower through charge: *Held*, That the through rate is the only lawful rate.<sup>10</sup>

1. Atchison, T. & S. F. Ry. Co. v. Denver & N. O. Rd. Co. (1883), 110 U. S. 667, 28 L. Ed. 291, 4 Sup. Ct. Rep. 185.
2. Brady v. Pennsylvania Rd. Co. (1888), 2 I. C. C. Rep. 131, 3 I. C. Rep. 78.
3. In the Matter of Through Routes and Through Rates (1907), 12 I. C. C. Rep. 164.
4. *Ibid.*
5. Conf. Rul. Bul., Rule 172 (May 4, 1909).
6. Tariff Circular 18-A, Rule 5, c.
7. *Ibid.* See Rutter & Co. v. Chicago & N. W. Ry. Co. (1915), 36 I. C. C. Rep. 272.
8. Dayton Coal & Iron Co. v. Cincinnati, N. O. & T. P. Ry. Co. (1915), 239 U. S. 446, 36 Sup. Ct. Rep. 137, 60 L. Ed. 375.
9. Doran & Co. v. Nashville, C. & St. L. Ry. Co. (1915), 33 I. C. C. Rep. 523, 527; Less Carload Freight Reconsignment Privileges (I. & S. Docket, No. 434) (1914), 32 I. C. C. Rep. 85.
10. Conf. Rul. Bul., Rule 443 (October 7, 1913)).

**602-C. CARRIERS MAY SPECIFY BASING POINTS OR FACTORS FOR CONSTRUCTING COMBINATION RATE.**

A carrier may provide in its tariffs that, in the absence of a specific rate from point of origin to destination of a through shipment, combination rate to or via certain points will be made upon specified basing point or points, or by using certain specified tariffs or rates, and the combination rate so specified will be the lawful rate for that shipment.<sup>1</sup>

A carrier may incorporate in a tariff the following rule:<sup>2</sup>

Rates to destinations or from points of origin not shown in this tariff will, in the absence of specific rate from point of origin to destination, be made by adding to the rates shown in this tariff the rates shown in other tariffs lawfully on file with the Interstate Commerce Commission, but if the rate so made exceeds the rate to or from a point beyond on the same direct line or route as shown in this tariff, the latter rate will apply.

NOTE.—If a rate applies to or from a group or zone or blanket of points of origin or of destination, such rate will be considered as "named" or "shown" from each point within such properly described group, zone, or blanket.

When desired the following may be added:<sup>3</sup>

Rates so made will apply via all routes authorized under this tariff to or from contiguous points of origin or of destination.

If shipment moves to or from a point of origin or of destination or via a junction point with connecting or branch line at which interchange is made *directly intermediate to the base point upon which the lowest combination makes*, such combination must be applied; and it is not necessary to haul the shipment to such base point and back again to or through point of origin or destination or such junction point.<sup>4</sup>

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1. Tariff Circular 18-A, Rule 5, b.

2. Ibid.

3. Ibid.

4. Ibid.

**602-D. RATE TO APPLY IN THE ABSENCE OF A JOINT RATE OR A SPECIFIC METHOD OF CONSTRUCTING THROUGH RATE.**

If no specific rate from point of origin to destination of a through shipment is provided, and no specific manner of constructing combination rate for it is prescribed, the lowest combination of rates applicable via the route over which the shipment moves is the lawful rate for that shipment.<sup>1</sup>

In the case of *Chicago, B. & Q. Ry. Co., v. United States*,<sup>2</sup> the Circuit Court of Appeals, per Mr. Circuit Judge Hook, stated:

"If an initial carrier accepts traffic for transportation and issues its bill of lading over a route made up of connecting roads for which no joint through rate has been published and filed with the Commission, the lawful rate to be charged is the sum of the established local rates published and filed by the individual roads; or if there is a local rate over one road and a joint rate over the others for the remainder of the route, all published and filed with the Commission, the lawful through rate to be charged is the sum of the local and joint rates. By failing to establish or concur in a joint through rate for traffic accepted for interstate transportation, each participating carrier impliedly asserts that the rate which it has duly established, published, and filed for its own line shall be a component part of the through rate to be charged. It is competent for carriers, if conditions justify it, to make their proportions of the through rate less than the local charges upon their own

lines, but in so doing they should observe legal methods, and if no action to that end is taken they in effect adhere to the rates established, published, and filed by them as applying not only to local but to through traffic. The initial carrier which receives traffic and issues a bill of lading to ultimate destination should be held to have done so in view of the only rates which its connections are authorized by law to charge. This principle was recognized by the Commission as early as March 23, 1899 (2 Interst. Com. Com'n. R. 656), when it said:

“ ‘When no other tariff is filed, the rates on traffic carried over or upon more than one line will be the sum of the local rates of the individual roads, or of local and joint rates, as the case may be.’ ”

“By routing and billing the traffic over the connecting lines the initial carriers adopts and is bound by their lawful rates. In the concert of action, in the successive receipt and movement of the traffic by the connecting carriers under through bills of lading for continuous carriage is manifested the ‘common arrangement’ contemplated by the act of Congress. No previous formal contract is necessary to bring the carriers under the provisions of the law. Thus, in *Cincinnati, etc. Railway v. Interstate Commerce Commission*, 162 U. S. 184, 16 Sup. Ct. Rep. 700, 40 L. Ed. 935, it was held that the arrangement constituting participation by a local carrier in interstate commerce is effected by its receipt and transportation of interstate traffic under through bills of lading.”

Shipments over connecting lines, even though moving on through bills of lading, must, under the Interstate Commerce Act, take the lawfully established local rate in force on each line, where there is no established joint through rate.<sup>3</sup>

An agreement with a single shipper for shipments over connecting lines having no joint through rate, at less than the established local rates of each road, is void and does not prevent the collecting of the established local rate by such carrier, under section 6 of the Interstate Commerce Act providing the method of establishing rates and making it unlawful for a carrier to depart from any rate so established and in force at the time and requiring connecting carriers agreeing on joint through rates to file schedules with the Interstate Commerce Commission, and prohibiting any deviation from an established joint rate while in force.<sup>4</sup>

The Missouri Pacific Railway Company received earloads of beer in St. Louis for transportation to Leadville, Colo., issuing receipts therefor showing contents, weight, destination, and consignee, and that the shipment was received subject to its uniform bill of lading, to be delivered to the consignee and routed over the line of the Denver & Rio Grande Railroad Company. At Pueblo, Colo., it turned the ears over to the latter company, which moved them to Leadville on a local waybill, showing the consignor and consignee and the rate and charge of each company. The two companies had an established joint rate between St. Louis and Leadville, but they constantly exchanged traffic between such points; each charging its own local rate to and from Pueblo. The total freight was collected by one, either from the consignor or consignee, and daily settlements were made between them. Held, That such course of business was in fact the establishment of a

"through route" between the two points, within the meaning of section 6 of the Interstate Commerce Act, which requires the filing of schedules of the "separately established rates" applied by a carrier on through traffic, when there is a through route, but no joint rate, and that such rate established by the Denver Company was within the terms of the Act, and as a part of the through charge was subject to regulation by the Interstate Commerce Commission under Section 15 of the Act.<sup>5</sup>

In the case of *Missouri P. Rd. Co. v. Rea-Patterson Milling Co.*,<sup>6</sup> the Circuit Court of Appeals, per Mr. Justice Lewis, stated: "The Missouri Pacific Railroad Company received from defendant in error at Coffeyville, Kansas, a carload of flour for shipment to Smithland, Texas. The car went to destination over the Missouri Pacific, Kansas City Southern, and Black Bayou Railroads. There was disagreement as to the amount to be charged by the carrier. The shipper paid \$166.89; the carrier claimed \$207.74, and brought this action to recover the difference. When the trial came on a stipulation settled all material facts not admitted in the pleadings, and the court determined the resultant issue of law in favor of the defendant shipper.

"There was no through rate, and it is agreed that the proper charge was to be made up by a combination of the lowest intermediate rates applicable to the shipment. The Kansas City Southern hauled the car into, through and to a point beyond Texarkana, and a correct determination of the issue turns solely on the inquiry as to what rate between that station and destination should be applied in making up the combination.

"The stipulation of the fact recites:

"That the Kansas City Southern tariff published a rate of eight cents per one hundred pounds on such commodities from Texarkana, Arkansas, to Smithland, Texas, which tariff further provides:

"Rates named herein apply only on traffic. .... Texarkana, Ark.-Tex. (proper)....."

"For such commodities moving into Texarkana from other points, including Coffeyville, and from thence to Smithland, Texas, the tariff of the Kansas City Southern provided a rate of eighteen cents."

"It was agreed in the stipulation that if the eighteen cent rate was applicable to the shipment the plaintiff was entitled to judgment for \$40.85, and if the lower rate was applicable nothing further was due.

"We do not doubt that the eight cent rate applied only to shipments originating at Texarkana, and that the eighteen cent rate was unreasonable. *T. & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 533, 9 Ann. Cas. 1075; *T. & P. Ry. Co. v. American T. & T. Co.*, 234 U. S. 138, 34 Sup. Ct. 885, 58 L. Ed. 1255. The judgment is reversed."

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1. Tariff-Circular 18-A, Rule 5, c; *Pecos & N. T. Ry. Co. v. Porter* (Tex. 1913), 156 S. W. 267, 272.
  2. *Chicago, B. & Q. Ry. Co. v. United States* (1907), 157 Fed. Rep. 830, 833.
  3. *Kansas City S. Ry. Co. v. Albers Commission Co.* (1912), 223 U. S. 573, 56 L. Ed. 536, 32 Sup. Ct. Rep. 316.
  4. *Ibid.*
  5. *Denver & R. G. Rd. Co. v. Interstate Commerce Commission* (1912), 195 Fed. Rep. 968; holding order of Commission to be valid in *Baer Bros. Mercantile Co. v. Missouri P. Ry. Co.* (1909), 17 I. C. C. Rep. 225, in which case carriers were ordered by the Commission to reduce that portion of a combination through rate which applied to the haul from Pueblo, Colo., to Leadville, Colo., on beer moving from St. Louis, Mo., on the ground that such factor of the through rate was unreasonable.
  6. *Missouri P. Rd. Co. v. Rea-Patterson Milling Co.* (1921), 273 Fed. Rep. 518, 519.

602-E. RIGHT OF A SHIPPER TO CONSIGN INTERSTATE TRAFFIC TO AN INTERMEDIATE POINT, ASSUME CUSTODY OF THE SHIPMENT, EITHER ACTUAL OR CONSTRUCTIVE, AND THEN REBILL THE SAME TO DESTINATION, WHERE THE JOINT THROUGH INTERSTATE RATE IS HIGHER THAN THE AGGREGATE OF THE INTERMEDIATE RATES.

See "*Status of transportation within a State of traffic originating at a point without the State, or intended for ultimate delivery at a point without the State, where the State movement is under a new bill of lading, or contract of shipment, and the traffic is not unloaded at the intermediate point,*" Section 400-D, ante.

602-F. COMBINATION OF JOINT RATE TO COMMON POINT AND LOCAL RATE BEYOND.

In order to secure uniformity in practice and understandings, and to remove the cause of many complaints, the Commission decided that, when a joint through rate is the same to two or more points, and rate on through shipment to local station, to which no specific joint through rate applies, is made up by combination of such joint through rate to common points, and local rate beyond, the rate for through shipment must be determined by calculating the joint through rate to the point from which the lower local rate applies to point of destination, and adding thereto such local rate. For example: Joint through tariff names the same rates from certain Eastern points to Chicago and Milwaukee. If shipment is destined to a point to which the local rate is less from Milwaukee than from Chicago, the rate applied should be the joint through rate to Milwaukee, plus the local rate from Milwaukee to destination, and unless the lines of delivering carrier reach both Chicago and Milwaukee, the shipment should move via Milwaukee. If the local rate from Chicago to point of destination is lower than from Milwaukee, the rate should be the joint through rate to Chicago, plus the local rate from Chicago to destination, and unless the lines of the delivering carrier reach both Milwaukee and Chicago the shipment should move via Chicago.<sup>1</sup>

Rates for outbound through movements from such local stations and under like circumstances must be applied on the same basis where the joint through rates are the same from two or more points.

This does not authorize any carrier to apply to transportation over its lines any rate except those stated in its own lawfully published tariffs or in the lawfully published joint tariffs in which it has concurred. If a carrier desires to "meet the rate" of a competitor, it must do so by lawfully including in its own tariffs such specific rates, proportional or otherwise, as may be necessary so to do.<sup>2</sup>

The Commission suggested that shippers can assist in avoiding mistakes and misunderstandings, by calling attention to the rate that should apply in such cases as come under this rule by indicating it on shipping bill in connection with routing instructions; for instance, "Rate on Milwaukee." This is, however, merely a suggestion, and does not relieve the agents of carriers from the responsibility of quoting and applying the correct lawful rate.<sup>3</sup>

This rule does not apply in case where shipment has reached its destination as originally given by shipper and has been recognized,

except when tariff contains reconsignment rule that provides for such application.<sup>4</sup>

This rule must not apply in any case where there is an applicable specific joint through rate from point of origin to point of destination.<sup>5</sup>

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1. Conf. Rul. Bul., Rule 215 (March 18, 1907). This rule applied in Larroewe Milling Co. v. Chicago & N. W. Ry. Co. (1910), 17 I. C. C. Rep. 443; same, 17 I. C. C. Rep. 548; Rehlberg & Co. v. Erie Rd. Co. (1910), 17 I. C. C. Rep. 508.
  2. Conf. Rul. Bul., Rule 215 (March 18, 1907).
  3. Ibid.
  4. Ibid.
  5. Ibid..

**602-G. RATES THAT ARE NOT ON FILE WITH THE INTERSTATE COMMERCE COMMISSION ARE NOT LAWFUL FACTORS IN CONSTRUCTING THROUGH INTERSTATE RATES.**

Rates that are not on file with the Interstate Commerce Commission cannot be used in constructing a through interstate charge.<sup>1</sup> Neither are such rates lawful factors to be considered by the Commission in the determination of the reasonableness of a joint rate.<sup>2</sup>

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1. Hagar Iron Co. v. Pennsylvania Rd. Co. (1910), 18 I. C. C. Rep. 529.
  2. Milburn Wagon Co. v. Lake Shore & M. S. Ry. Co. (1910), 18 I. C. C. Rep. 144.

**602-H. INTER-CLASSIFICATION TERRITORIES RATES AND INTER-RATE TERRITORIES RATES.**

Combinations which make lower through rates should not be exceeded, even though the factors comprising the combination are governed by different classifications.<sup>1</sup> It must not be assumed that a basing line for rates may be established and be made an impassable barrier for through rates.<sup>2</sup>

When through rates are published from points in one classification territory to points in a territory in which a different classification applies they must be made subject to one or the other of such classifications. It will be seen from the above that where such through rates are approximately equal to the sums of the intermediate rates of corresponding classes the charges computed at the through rate subject to the higher classification will exceed in some instances the aggregate of the charges to and from points at the boundaries of the classification territories computed at rates subject to one classification up to the boundary line and to a different one beyond. This can be avoided only by reducing the through rates or increasing the intermediate rates, or by both processes, so that the former will in no instance produce a greater total charge on a through shipment than the aggregate of the charges obtained by the use of rates to and from an intermediate point; or by publishing commodity rates to apply on various articles on which the charges on the basis of the through rate would not exceed the aggregate of the charges based on the intermediate rates.<sup>3</sup>

In *Western Cement Rates*<sup>4</sup> the Commission stated: "Where a producing point is located upon the boundary line between territories, the proper scale or scales applied depends upon the direction of the movement. In such cases the producing point shall be considered to be

in that territory within which the point of destination is located except that, if the point of destination is not in either of the territories whose common boundary passes through the producing point, then the producing point shall be considered to be within the territory which is bounded by such common boundary line nearest to the point of destination. \* \* \* A similar rule *mutatis mutandis*, will be applied to destinations located upon boundary lines."

1. Memphis Freight Bureau v. St. Louis, I. M. & S. Ry. Co. (1916), 39 I. C. C. Rep. 224; Lehigh Portland Cement Co. v. Baltimore & O. S. W. Rd. Co. (1915), 35 I. C. C. Rep. 14.
2. Burnham, Hanna, Munger Dry Goods Co. v. Chicago, R. I. & P. Ry. Co. (1908), 14 I. C. C. Rep. 299, 314.
3. Through Rates to Points in Louisiana and Texas (1916), 38 I. C. C. Rep. 153, 159.
4. Western Cement Rates: In the Matter of Rates on Cement between Points in the Western Trunk Line Territory and between Points in the Western Trunk Line Territory and Adjacent Territories (1918), 48 I. C. C. Rep. 201, 248.

#### 602-I. A SHIPPER IS NOT CONCERNED WITH THE DIVISIONS OF A THROUGH RATE.

A shipper has no legal grievance with respect to his through traffic unless compelled to pay excessive charges for the through service. If the through charges are lawful in the sense that they are reasonable charges for the through service, a shipper cannot predicate unlawfulness of one of the component parts of the through charges by alleging that it is excessive compensation to that carrier for that part of the through service. He pays for the completed service, and it is no concern of his how the through charges are divided among the carriers, whether by agreement or by published proportionals, so long as the through charges for the through carriage are reasonable.<sup>1</sup>

1. State of Iowa v. Chicago, St. P. M. & O. Ry. Co. (1913), 28 I. C. C. Rep. 64, cited, Northern Pine Manufacturers' Ass'n v. Chicago & N. W. Ry. Co. (1915), 53 I. C. C. Rep. 360, 365; Des Moines Saw Mill Co. v. Minneapolis & St. L. Rd. Co. (1915), 35 I. C. C. Rep. 182, 184.

#### 602-J. A THROUGH ROUTE MAY NOT BE DIVIDED INTO DIVISIONS FOR RATE-MAKING PURPOSES.

If, in making rates, a through route is to be divided into divisions and these divisions subdivided into sections, why should not the separation continue until the road is dissected into as many parts as there are stations, or miles, or even feet of track.<sup>1</sup> Such a method was condemned by the Supreme Court of the United States in the case of *St. Louis & S. F. Ry. Co. v. Gill*,<sup>2</sup> where it is said:

"That the correct test was as to the effect of the act on the defendant's entire line, and not upon that part which was formerly a part of one of the consolidated roads; that the company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative; that it would be practically impossible to ascertain in what proportion the several parts should share with others in the expenses and receipts in which they participated; and, finally, that to the extent that the question of injustice is to be determined by the effects of the act upon the earnings of the company, the earnings of the entire line must be esti-

mated as against all its legitimate expenses under the operation of the act within the limits of the State of Arkansas."

1. Louisville & Nashville Railroad Coal and Coke Rates (1913), 26 I. C. C. Rep. 20, 30; cited, Wellington Mines Co. v. Colorado & S. Ry. Co. (1916), 39 I. C. C. Rep. 202, 205.
2. St. Louis & S. F. Ry. Co. v. Gill (1895), 156 U. S. 649, 665-666, 39 L. Ed. 567, 15 Sup. Ct. Rep. 484.

#### 602-K. COMMODITY RATES SHOULD BE STATED THROUGH FROM POINT OF ORIGIN TO DESTINATION.

While existence of two classifications may explain the fact that class rates are made by combination there is no such reason or justification for commodity rates being so stated.<sup>1</sup>

1. Lehigh Portland Cement Co. v. Baltimore & O. S. W. Rd. Co. (1915), 35 I. C. C. Rep. 14, 17.

#### 602-L. REASONABLENESS OF THROUGH RATE COMPOSED OF AGGREGATE OF INTERMEDIATE RATES.

See "*Reasonableness of a through rate composed of the aggregate of intermediate rates,*" Section 609-EE, *post*.

#### 602-M. RATES BETWEEN POINTS IN THE UNITED STATES AND ADJACENT FOREIGN COUNTRIES.

In the absence of a published through rate between a point in the United States and a point in an adjacent foreign country, the published through rate between the border gateway and the domestic point should be applied in constructing the total rate. In the absence of a published through rate between the border gateway and the domestic point the lowest combination of legal rates should be applied.<sup>1</sup>

Upon a movement from a domestic point to a destination in Canada charges were assessed at a combination of rates both factors of which were on file with the Commission, but which made higher than another combination over the same route one factor of which was on file with the Canadian Commission but not with the Interstate Commerce Commission: *Held*, That the Commission cannot award reparation on the latter combination.<sup>2</sup>

1. Conf. Rul. Bul. Rule 488 (January 10, 1916).

2. Conf. Rul. Bul. Rule 256 (February 7, 1910).

#### 602-N. LEGAL STATUS OF A JOINT THROUGH RATE THAT EXCEEDS THE AGGREGATE OF INTERMEDIATE RATES.

See "*A joint through interstate rate which exceeds the aggregate of the intermediate rates, subject to the Act, is unlawful and non-enforceable,*" Section 609-FF, *post*, and "*Legal status of a joint through rate that is higher than the aggregate of the intermediate rates subject to the provisions of the Act,*" Section 711-B, *post*.

However, in giving consideration to this item it should be noted that this proposition of law has not been judicially established and

until passed upon by a Court of competent jurisdiction, shippers should operate under the administrative rulings of the Interstate Commerce Commission as herein contained.

**602-O. RIGHT OF SHIPPER TO USE ANY THROUGH ROUTE AVAILABLE UNDER THE TARIFF RATES.**

Shippers are entitled, under the Act to Regulate Commerce, to use any through route available under the tariffs. If the tariffs are so worded that routes other than a direct route are possible, such routes should be available alike to all shippers, whether availed under a reconsignment order or upon original billing. The through route applicable via such route should be assessed against all shipments of the same kind of freight regardless of whether the shipment traveled the particular route because of a reconsignment order or under original billing. The haul for which this rate is assessed in the one instance is identical with that in the other.<sup>1</sup>

If the carriers intend to restrict the application of the joint rates to any particular route, and to likewise restrict the reconsignment service in connection therewith, they should do so in clear and unequivocal language.<sup>2</sup>

See "*Limitation on application of joint rate,*" Section 601-O, *Ante*, and "*Routes and Routing,*" Chapter 11, *post*.

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1. Reconsignment and Diversion Rules (1920), 58 I. C. C. Rep. 568, 573.

2. Watters-Tongue Lumber Co. v. Baltimore & O. S. W. Rd. Co. (1920), 59 I. C. C. Rep. 229, 231, citing, Van Dusen Harrington Co. v. Chicago, M. & St. P. Ry. Co., (1917), 47 I. C. C. Rep. 59.

**603. Establishment of freight rates.**

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**603-A. DUTY OF CARRIERS TO INITIATE RATES.**

The first section of the Interstate Commerce Act provides as follows:

It shall be the duty of every common carrier subject to this Act engaged in the transportation of \* \* \* or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, \* \* \* and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, \* \* \*, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act, participating therein which shall not unduly prefer or prejudice any of such participating carriers.

Under the operation of the Interstate Commerce Act, the right to initiate interstate rates rests entirely with the railway, which may, by giving thirty days' notice, put into effect any rate or any regulation or practice affecting a rates which it sees fit.<sup>1</sup> The railroads themselves must, in all cases, initiate their transportation charges. When their schedules have been filed with the Interstate Commerce Commission, any party may complain and the Commission must investigate upon that complaint. The Commission may also, upon its own motion, suspend tariffs which are filed and institute proceedings of investigation.<sup>2</sup>

There is no exact standard by which the reasonableness of a rate can be measured. While there are many facts capable of precise determination which bear upon that question, the final answer is a

matter of judgment. The traffic official who establishes the rate exercises his judgment in the first instance, and the Commission when it revises that rate substitutes its judgment for that of the traffic official. With varying conditions the reasonableness of rate itself may vary, so that the rate which is reasonable today may be unreasonable tomorrow.<sup>3</sup>

Inasmuch as railways are authorized to establish in the first instance, their transportation charges, the presumption of right doing attaches to their acts in the establishment of those rates.<sup>4</sup> So long as the carriers do not abuse the right conferred upon them by the statute, the Commission is not justified in penalizing them.<sup>5</sup> While carriers may take competition into consideration and make rates to meet it, the Commission has never held that it could compel them to do so. In such a case the question of policy or expediency in fixing a rate which is less than the maximum of what is reasonable under the law left to the discretion and judgment of the carrier. The law authorizing the Commission in dealing with the amount of a rate, aside from the question of discrimination, limits its authority to the fixing of that which is the maximum reasonable rate for the service to be performed. The Commission has no power to substitute a proposed new rate for an existing just and reasonable rate on the ground that in its judgment it would be wise policy to so do.<sup>6</sup>

On the question of the power of the Commission to initiate, modify, establish or adjust rates so that the *aggregate rates* will yield a fair return upon the aggregate value of the railway property of the same held for and used in the service of transportation, see "*Jurisdiction of Interstate Commerce Commission over freight rates and charges*," Section 613, *post*, and "*Railway Finances—Guaranteed Return On Railway Property*," Chapter 55, *post*.

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1. Twenty-First Annual Report of I. C. C. (1907), p. 9.
  2. *In the Matter of Rates, Classifications, Regulations, and Practices of Carriers* (1913), 27 I. C. C. Rep. 560, 614.
  3. *Railroad Commission of Oregon v. Oregon Rd. & Nav. Co.* (1913), 25 I. C. C. Rep. 675, 677.
  4. *Banner Milling Co. v. New York Central & H. R. Rd. Co.* (1908), 14 I. C. C. Rep. 398, 408.
  5. *Foster Lumber Co. v. Atchison, T. & S. F. Ry. Co.* (1909), 15 I. C. C. Rep. 56; *National Hay Assn. v. Lake Shore & M. S. Ry. Co.* (1902), 9 I. C. C. Rep. 264.
  6. *New York Produce Exchange v. New York C. & H. Rd. Co.* (1914), 32 I. C. C. Rep. 212, 215, citing; *Southern P. Co. v. Interstate Commerce Commission* (1911), 219 U. S. 433, 443, 55 L. Ed. 283, 31 Sup. Ct. Rep. 288.

#### 603-B. WHEN AN INTERSTATE FREIGHT RATE IS ESTABLISHED.

Interstate freight rates are established when schedules thereof are regularly printed, filed with the Interstate Commerce Commission, and kept open to public inspection by the carrier at its freight offices, although such rates may not be posted in public and conspicuous places, as required by section 6 of the Act to regulate Commerce, as posting is not essential to make rates legally operative, but is required only as a means of affording special facilities to the public for ascertaining the rates actually in force.<sup>1</sup>

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1. *Kansas City S. Ry. Co. v. Albers Commission Co.* (1912), 223 U. S. 573, 56 L. Ed. 556, 32 Sup. Ct. Rep. 316; *Wickwire Steel Co. v. New York C. & H. R. Rd. Co.* 1910, 181 Fed. Rep. 316, 104 C. C. A. 504.

### 603-C. THE SHIPPER HAS A CONTRACT RIGHT IN THE PUBLISHED RATE.

Under the specific and mandatory provisions of section 6 of the Interstate Commerce Act, which makes it the indispensable duty of an interstate railroad carrier to file and publish schedules of all rates and any rules or regulations which in any wise "change, affect, or determine any part of the aggregate of such aforesaid rates," and prohibit it from charging or receiving any greater or less or different compensation than specified in such schedules, from extending to any shipper any privilege or facilities "except such as are specified in such tariffs," and from making any change in such rates except by plainly changing the schedule or filing or publishing new ones, after 30 days' notice, on the delivery of goods for carriage by a shipper, he has a contract right to the rates named in the schedule at the time on file and published, and to the benefit of all privileges and facilities specified therein which enter into such published rates.<sup>1</sup>

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1. American Sugar Refining Co. v. Delaware, L. & W. Rd. Co. (1913), 207 Fed. Rep. 733; 125 C. C. A. 251, reversing American Sugar Refining Co. v. Delaware, L. & W. Ry. Co. (1912), 200 Fed. Rep. 652.

### 603-D. RATES ARE NOT NULLIFIED BY THE FAILURE OF THE CARRIERS TO AGREE UPON THE DIVISIONS THEREOF.

The Commission has held that the fact that the carriers, by which the rate has been lawfully published and advertised to the shipping world as the cost of transportation between two given points over all reasonably available routes, have neglected or failed to agree upon divisions of the rate over one of the routes cannot be accepted as equivalent to a nullification of the published through rate over that route. Divisions are matters of private agreement and for that reason, generally speaking, are of no special concern to shippers, nor are they essential to legalize a published through rate.<sup>1</sup>

However, shippers may not be compelled to wait indefinitely for reasonable rates which are withheld because of the inability of carriers to agree as to how they will divide the earnings.<sup>2</sup> A carrier is not entitled to withhold reasonable rates from a city on the ground that it is unable to agree upon divisions with connecting carriers.<sup>3</sup>

Disagreements among carriers relative to divisions of joint rates are insufficient to justify cancellation of such rates.<sup>4</sup> A mere fact of disagreement between the carriers as to divisions does not prove that the joint rates are unreasonable, or that the routes over which they are applied should be abandoned.<sup>5</sup>

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1. Germain Company v. New Orleans & N. E. Rd. Co. (1909), 17 I. C. C. Rep. 22.  
 2. Milburn Wagon Co. v. Lake Shore & M. S. Ry. Co. (1911), 22 I. C. C. Rep. 93.  
 3. Ibid.; Willamette Pulp & Paper Co. v. Northern P. Ry. Co. (1910), 18 I. C. C. Rep. 388.  
 4. Passenger Fares from Milwaukee, Wis. (1916), 38 I. C. C. Rep. 98, 100.  
 5. Lake and Rail Rate Cancellations (1916), 38 I. C. C. Rep. 201, 202.

### 603-E. PRESUMPTION THAT CARRIER ACTED IN GOOD FAITH IN INITIATING RATES.

The law imposes upon the carriers the duty of initiating their rates, under the injunction of the statute that they shall be reasonable

and just. In the performance of this duty by the carriers they must exercise judgment and discretion by a like resort to existing facts, circumstances and conditions in the *first instance, just as the Commission must later do* when the rates are brought in question before it. The carriers are presumed to act in good faith in their exercise of discretion and judgment under this somewhat indefinite standard of the statute in its practical application, and therefore rates established by the carriers can not be condemned except upon investigation and full hearing. A rate reasonable in view of the circumstances and conditions when it is established may in course of time become unreasonable by virtue of changed circumstances and conditions. It is manifestly impracticable for the carriers or the Commission in such a case to determine at what exact time in the gradual process of changes the rate becomes unreasonable.<sup>1</sup>

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1. Anadarko Cotton Oil Co. v. Atchison, T. & S. F. Ry. Co. (1910), 20 I. C. C. Rep. 43, 50.

#### 603-F. "PAPER" RATES.

A shipper is entitled to have his interstate freight moved at reasonable rates. The fact that for a long time there had been no movement of a particular commodity is no justification for the maintenance of an unreasonable rate.<sup>1</sup> So, a shipper proposing to establish an industry has the right to ascertain in advance what rates will be established on his particular traffic.<sup>2</sup> In the case of *Lum v. Great Northern Ry. Co.*<sup>3</sup> the Commission held that it could not regard as material the allegation that the complainant could not possibly ship ore within two years of the effective period of an order of the Commission. That if the Commission prescribes a reasonable rate today for the movement of traffic which possibly may not move within two years, and the railway company refuses voluntarily to continue that rate for a period longer than two years, it becomes the plain duty of the Commission to institute a new investigation at the proper time and prescribe a rate which shall be just and reasonable under the circumstances and conditions prevailing at such time. That a shipper has the right to know what the lawful published rate on his proposed product is and will be for a reasonable period of time in the future. That the Commission cannot deny the right of the complainant to secure the publication of a rate in advance of far-reaching and consequential business arrangements which can be profitably made when predicated upon one rate, and which cannot possibly be made on a commercial basis when predicated upon a higher rate.

The Commission has held that it will not consider the reasonableness of a mere "paper" rate where there is no production of the commodity covered by such rate.<sup>4</sup>

See "Paper rates," Section 600-K, ante.

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1. Scheuing v. Louisville & N. Rd. Co. (1911), 20 I. C. C. Rep. 550, 552.  
2. Suffern Grain Co. v. Illinois C. Rd. Co. (1911), 22 I. C. C. Rep. 178, 184.  
3. Lum v. Great Northern Ry. Co. (1911), 21 I. C. C. Rep. 558.  
4. Sligo Iron Store Co. v. Atchison, T. & S. F. Ry. Co. (1909), 17 I. C. C. Rep. 139, 142.

## 603-G. RULES FOR DISPOSITION OF FRACTIONS IN PUBLICATION OF RATES.

The Commission has held that in the publication of Central Freight Association class rates that the following rule for the disposition of fractions shown in those scales shall be observed: Fractions of less than  $\frac{1}{4}$  or .25, to be omitted; fraction of  $\frac{1}{4}$  or .25, or greater, but less than  $\frac{3}{4}$  or .75, to be shown as one-half ( $\frac{1}{2}$ ); fractions of  $\frac{3}{4}$  or .75, or greater, to be increased to the next whole figure.<sup>1</sup> This rule for disposing of fractions was also applied by the Interstate Commerce Commission in computing and applying all the increased rates authorized in *Ex Parte* 74.<sup>2</sup>

Where rates are stated in dollars per carload, including articles moving on their own wheels, when not stated in amounts per 100 pounds or per ton, amounts of less than 25 cents will be dropped; thus, \$25.24 will be stated as \$25.00. Amounts of 25 cents or more but less than 75 cents will be stated as 50 cents; thus, \$25.65 will be stated as \$25.50. Amounts of 75 cents or more but less than \$1.00 will be raised to the next dollar.<sup>3</sup>

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1. Central Freight Association Class Scale Case (I. & S. Docket No. 965) (1917), 45 I. C. C. Rep. 254, 287.
  2. In the Matter of the Applications of Carriers in Official, Southern and Western Classification Territories for Authority to Increase Rates, (Ex. Parte 74) (July 29, 1920) 58 I. C. C. Rep. 220, 255.
  3. Ibid.

## 603-H. EFFECTIVE DATE OF NEW RATES AND SUBSEQUENT ADJUSTMENTS UNDER INCREASED RATES, 1920, COVERED BY EX PARTE 74.

In *Ex Parte* 74 entitled "*In the Matter of the Applications of Carriers in Official, Southern, and Western Classification Territories for Authority to Increase Rates*"<sup>1</sup> the Commission states: "In view of the existing situation it is important that the increased rates be made effective at as early a date as practicable. The increases herein approved may be made effective upon not less than five days' notice to the Commission and to the general public by filing and posting in the manner prescribed in the Interstate Commerce Act. The authority herein granted will not apply to any rates, fares, or charges filed with this Commission to become effective later than January 1, 1921.

"Most of the factors with which we are dealing are constantly changing. It is impossible to forecast with any degree of certainty what the volume of traffic will be. The general price level is changing from month to month and from day to day. It is impracticable at this time to adjust all of the rates on individual commodities. The rates to be established on the basis hereinbefore approved must necessarily be subject to such readjustments as the facts may warrant. It is conceded by the carriers that readjustments will be necessary. It is expected that shippers will take these matters up in the first instance with the carriers and the latter will be expected to deal promptly and effectively therewith, to the end that necessary readjustments may be made in as many instances as practicable without appeal to us."

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1. In the Matter of the Applications of Carriers in Official, Southern and Western Classification Territories for Authority to Increase Rates (Ex. Parte 74) (July 29, 1920), 58 I. C. C. Rep. 220, 255.

**603-I. STATUS OF PREWAR INTRASTATE RATES AFTER TERMINATION OF FEDERAL CONTROL.**

Section 208 (a) of the Transportation Act, 1920, provides as follows:

All rates, fares, and charges, and all classifications, regulations and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare or charge, unless such reduction or change is approved by the Commission.

In *Michigan C. Rd. Co. v. Michigan Public Utilities Commission*<sup>1</sup> the District Court for the Eastern District of Michigan held that by Section 208 (a) of the Transportation Act of February 28, 1920, it was clearly intended that the State statutes or the regulations fixing intrastate rates, which were suspended during Federal control, should not automatically again go into effect on the cessation of such control. Following is reproduced the decision, *per curiam*:

"This is an application for a preliminary injunction, heard before three judges pursuant to section 266 of the Judicial Code (Comp. St. § 1243).

"For several years before 1919, the Michigan statute had fixed the rate for intrastate railroad passenger transportation (with exceptions not now material) at the sum of 2 cents per mile. Act No. 382 of the Public Acts of 1919, approved May 13, 1919, fixed it at 2½ cents per mile (with similar exceptions), but contained this proviso:

"This act shall not apply to any railroad, the control of which has been taken over by the federal government, while under such federal control.

"The Michigan Central Railroad, and each of the 12 other railroads whose similar applications are heard with this, had passed into and remained under federal control, pursuant to the act of Congress approved March 21, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115 $\frac{3}{4}$ a-3115 $\frac{3}{4}$ p), and the presidential proclamations thereunder. During this period of federal control, the passenger rate for intrastate transportation had been fixed at 3 cents per mile, and this was the rate on February 29, 1920. On February 28, 1920, the act of Congress known as the Transportation Act (41 Stat. p. 456), was approved. It was thereby provided that the railroads should be returned to their owners and federal control should cease on February 29 (March 1), 1920, but that, until September 1, 1920, the government would guarantee the railroads a certain prescribed net return. Section 208a of the Transportation Act is as follows:

"All rates, fares, and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare or charge, unless such reduction or charge is approved by the commission."

"Upon the theory that federal control, within the meaning of the Michigan act of 1919, would terminate, at the latest, on September 1, 1920, the Michigan Public Utilities Commission gave notice to the rail-

roads that on and after that date the fare must be reduced to 2½ cents. The bills in these cases were filed against the commission and the Attorney General and one of the prosecuting attorneys, to enjoin proceedings to enforce the Michigan act. The jurisdiction of this court is invoked, because the case arises under the laws of the United States, and because the 2½-cent rate would be confiscatory, and because the severity of the penalties would deprive the railroad of the equal protection of the laws. Upon the hearing of this motion, sole reliance is placed upon the effect of the Transportation Act.

"1. No question has been raised about the propriety of constituting a court pursuant to section 266; but we do not overlook some possible uncertainty in this matter. This injunction is not sought 'upon the ground of the unconstitutionality of such statute,' in the more common sense in which we speak of unconstitutionality. That there is a conflict between state and federal law does not always bring to mind the issue of unconstitutionality of the former; yet it is prescribed by the federal Constitution that it and the laws and the treaties made in pursuance thereof shall be the supreme law of the land, and it seems to follow that a state statute which is in conflict with a federal statute, when the latter is pursuant to and within the power given by the federal Constitution, is, in a very fair sense, unconstitutional. We think the present situation is fully within the spirit and fairly within the letter of section 266, and that the court, as now constituted, has power to hear and determine the application. Even if otherwise, the District Judge, in whom the power would rest if the special court were not required, joins in this opinion and in directing the entry of the order thereon.

"2. Prior to the taking over of federal control, a complete system of intrastate rates existed in many or all of the states, and these rates were fixed, sometimes directly by statute, and sometimes by regulatory bodies. It was recognized that these intrastate rates were within the state jurisdiction, and were not a matter of federal control, save to a degree and in contingencies not here important. Undoubtedly all these various state laws and regulations were suspended by the operation of the Federal Control Act, having been thus merely suspended, and not repealed, they would automatically take effect again at the end of the suspension; that is, at the termination of the federal control. *Tua v. Carriere*, 117 U. S. 201, 209, 6 Sup. Ct. 565, 29 L. Ed. 855. If Congress, in passing the Transportation Act, intended that this automatic reversion should occur, that is the end of the matter, and the commission was right in proposing to enforce the Michigan act after September 1st; but, if Congress intended otherwise, we come to further questions. The congressional intent must, therefore, be ascertained.

"To us the intent seems very clear upon the face of the statute. We take notice of the orders of the Director General and of the Interstate Commerce Commission under which, during the period between March 21, 1918, and February 29, 1920, the cost of railroad operations had enormously increased and the rates had been advanced in an effort to provide the increased cost. We take notice, also, of the general change in conditions, such that, in February, 1920, perhaps no one could have been found who would contend that it would be fair or reasonable to reduce the railroad rates to the figures prevailing before the war and leave the roads subject to the permanently fixed and great-

ly increased costs of operation. It would seem most natural and reasonable that the rates, both interstate and intrastate, should remain at the figures then existing until the proper authority, federal with reference to one and state with reference to the other, should have opportunity to investigate the situation as it might then exist, and determine whether or not any change should occur. In apparent execution of this natural intent, we find the statute saying that the rates in effect on February 29, 1920, shall continue in force, until thereafter changed by state or federal authority, respectively, or pursuant to authority of law, and then providing that in no event shall the rates be reduced before September 1, 1920, unless with the approval of the Interstate Commerce Commission. It would be a strained construction of language to say that the mere automatic reversion to the pre-control status, which would have occurred on February 29, if the Transportation Act had made no inconsistent provision, is that change, subsequent to February 29, which the act contemplates when it speaks of 'thereafter changed.' Not only is it plain to us, by the words of the law, that Congress intended the then existing rates to continue until the regulating authority should, by due action thereafter taken and in view of the new situation, make a change; but, if there were doubt about it, the proceedings in Congress would remove the doubt.

"It will be observed that there is no distinction in section 208a between freight and passenger rates, nor between interstate and intra-state rates. The latter were, at this time, within the power of Congress, and the intent to reach them is clear from the reference to changes made by state authority, because such changes could refer to nothing else. The question whether automatic return to pre-control rates was desired would be the same as to interstate and intrastate, freight and passenger, matters. The bill, which later became the Transportation Act, was reported by the House committee on interstate commerce November 10, 1919. Report 456, 66th Congress. In this report, the committee refers to this clause, which then contained only the words, 'until thereafter changed by or pursuant to authority of law,' and points out that without such a provision all the rates would immediately revert to their pre-control status, and continues:

"In view of the enormous increase in operating costs of carriers, due to increased wages and cost of materials, restoration to former level would result in such enormous decrease in revenues as would render it utterly impossible, even for the stronger railroads, to meet operating expenses. By the insertion of the above section, the existing rates, fares, charges, etc., are to continue in force and effect until changed by or pursuant to authority of law; that is, until changed by the appropriate regulatory body."

"The chairman of the House committee, in presenting this bill (Congressional Record, Nov. 11, 1919, p. 8314), in speaking of this provision for continuing the rates in effect, said:

"It is apparent that, unless we put in a provision of this kind, then, as soon as the federal control ended, all the rates made under federal control would cease, and the rates would revert to their pre-control status—both interstate and intrastate. It is clear to all that that would be calamitous. If the rates of the federal railroads now existing, as fixed by the Director General, should suddenly be brought to a pre-control level, there would be scarcely a railroad in the United States that could begin to pay operating expenses. \* \* \* If control ceases without this section in the bill, the rates would be dropped 25 per cent. on freight and 50 per cent. on passengers, with the consequences I have already stated."

"Later the section was amended by inserting the words 'state or federal authority, respectively,' so that it took the form in which it passed. The member of the House committee who then seemed to be

in charge of the bill had pointed out that this language was intended to reach both the state authority and the federal authority, each within its proper regulatory scope, when a member proposed to amend by inserting:

"Provided that nothing in this section shall be construed to include intrastate shipments."

"The member in charge of the bill replied:

"That is not the intention. They are continued until the proper state authorities can pass upon them. Otherwise, they would come back to pre-war rates. Congressional Record, p. 8451."

"The proposed amendment then seems to have been abandoned.

"3. Reference to committee reports, and to what is said by the chairman of the committee in explaining the meaning of the bill, is proper in ascertaining its intent (*Duplex Co. v. Deering* [U. S. S. C., Jan. 3, 1921] 253 U. S.—, 41 Sup. Ct. 172, 65 L. Ed.—]), and these references seem to us to demonstrate that Congress intended to prevent the automatic reapplication of the superseded pre-control rates, either state or federal.

"4. It is true that the Michigan commission does not propose to revive any pre-control rate, since the Michigan act in question was not passed until May, 1919; but, while this distinction gives color of difference, we think there is none in principle. All pre-control state regulations and statutes were suspended during the period of federal control by the application of the familiar rule of law upon that subject. The Michigan statute of 1919 was suspended during the same period of federal control, but by its express words. The Transportation Act speaks as of February 29, 1920, and its insistence upon a change 'thereafter' made is no better satisfied by a state statute passed in 1919, and suspended by its terms during federal control, than by one passed in 1917 and suspended during the same period by operation of law. The best that can be said is that the reasons of Congress for not permitting the Michigan act of 1919 to come into automatic effect would not have been quite so strong as the same reasons were which applied to older regulations; but the language used does not permit of any distinction. Indeed, it might be said—though we are not very strongly impressed with the suggestion—that since the Transportation Act expressly declares that federal control of existing state rates does not cease until the state thereafter takes affirmative action, the very period of suspension provided by the words of the Michigan statute has not yet expired.

"Being satisfied as to congressional intent, the remaining question is one of power. It is urged on behalf of the railroads that under the terms of other portions of the Transportation Act it has come about that the fixing of an intrastate rate has such a direct effect upon the interstate rates as to justify Congress in taking over absolutely and permanently the whole matter of intrastate rates, and that Congress has done so. The contrary is forcefully argued, on behalf of the state. We find it unnecessary to consider these contentions, because we think the congressional right to effectuate the intent which we have found in section 208a is sufficiently based on the war power. The right to fix intrastate rates during federal control and as incidental to the war, power is settled. *Northern Pac. Co. v. North Dakota*, 250 U. S. 135, 148, 39 Sup. Ct. 502, 63 L. Ed. 897. It is also beyond dispute—indeed,

it is not denied by the Attorney General here—that the same power would extend to and cover federal regulation of state rates for a reasonable transition period (*Stewart v. Kahn*, 78 U. S. [11 Wall.] 493, 506, 20 L. Ed. 176), as incidental to the return of the railroads to their owners, covered by a shield which should prevent their immediate destruction; but it is claimed that the six months from March 1st to September 1st, during which the federal guaranty continued, exhausts such transitional or twilight period, and it is pointed out—as is true—that the effect of the construction which we give to this statute and of holding it valid to that extent is not merely to embarrass temporarily the state jurisdictions, but is really to abrogate the entire structure of rates, charges, etc., as made by statute or by commission, in every state of the Union where such structures existed. Every such state must begin again.

“On the other hand, while there is, for the time being, a complete abrogation, yet this is only during the acquiescence and approval of the states. They may, so far as this question is concerned, restore their pre-control structures at any time by a statute or an order of ten words. It also may be noted that section 210 of the Transportation Act specifies two years as a reasonable transition period for the retention of certain collateral federal powers, and this period has not yet expired.

“We cannot think that Congress exceeded its war powers in this particular. It was delivering back the railroads to their owners, saddled with burdens which made the rates of a year or two earlier quite impossible. In making this return, it was certainly proper for Congress to fix conditions which should preserve the property temporarily from the immediate destruction that would otherwise surely result; and Congress, in effect, declared that these existing rates, which had proved to be necessary during the war, were also necessary until the still existing war conditions should be materially modified. It turned over the property to the owners, and (as we are now assuming) it returned to the states the power of regulatory control, saying only that this control must not be exercised without a fresh consideration of what would be right and proper. We are content to rest our conclusion upon this construction of the war power.

“We have been compelled to consider these questions practically as matters of first impressions. We are informed that a similar court in the Second Circuit has reached the contrary conclusion, Circuit Judge Ward and District Judge Cooper concurring, and Circuit Judge Hough dissenting, and that three judges in the Eighth Circuit, Circuit Judge Sanborn, and District Judges Wade and Woodrough, have reached the same conclusion we do; but in neither case is there more than a bare announcement of the result.

“The temporary injunction should issue as prayed for. We are informed that a proceeding has been commenced in one of the state courts to prevent the application to intrastate transportation of rates fixed by the Interstate Commerce Commission under the claimed authority of the Transportation Act. No conflict between the jurisdiction acquired by this court upon the filing of the bills in these cases and the jurisdiction asserted by the state court in that matter has been pointed out, and all counsel disclaim the existence of any such conflict. The injunction to be issued is not intended to affect or embarrass the progress of that litigation; although, if any conflict of jurisdiction

should hereafter be claimed to exist or develop, the subject will be open for further consideration.

"There is precedent in this circuit which suggests the requirement of a bond or some other security from the railroad company that it will refund to the passengers one-half cent per mile in case the 2½-cent fare shall eventually be held lawful; but this precedent is in a case where plaintiff's right depended upon establishing the fact of confiscation, and where it was evident that there would be long delay. Here the Attorney General has not asked for a bond or other security, the controlling question is one of law, and does not seem to us doubtful, and there is no reason to anticipate long delay in getting the opinion of the Supreme Court upon one of the earlier cases, if not upon this. Under such circumstances, we do not think it necessary to order security. If any of these conditions change, an application will be entertained at any time.

"However, in view of the suggestion in *Minneapolis Co. v. Washburn Co.* (U. S. S. C., Dec. 20, 1920) 253 U. S. —, 41 Sup. Ct. 140, 65 L. Ed. —, each railroad, as a condition of getting its injunction issued, should file herein its consent and undertaking, in form and details approved by the judge of the district, that in case it shall finally be adjudged that 2½ cents has been the lawful fare, an accounting may be had at the foot of the decree in this case in which judgment may be rendered against the railroad in favor of each passenger for the excess fare wrongfully collected, and that, in such accounting, the excess payments may be established by such convenient method of informal proof as the court may direct."

1. Michigan C. Rd. Co. v. Michigan Public Utilities Commission (1921), 271 Fed. Rep. 319. The contra decision in the Second Circuit referred to in the above opinion is the case of New York C. Rd. Co. v. Public Service Commission of New York (1920), 268 Fed. Rep. 558, wherein the District Court for the Northern District of New York held that intrastate passenger rates of two cents per mile, which was by State statutes, were lawfully changed to three cents per mile under the Federal Control Act; it being a constitutional exercise of the war power of Congress.

In the same case the Court held that the Federal Control Act merely suspended existing State laws regulating rates, and that upon the termination of Federal control the State laws continued to control the rates ex proprio vigore. See also, case of Public Service Commission of New York v. New York C. Rd. Co. (1920), 129 N. E. 455, wherein it was held that the termination of federal control did not operate to automatically reduce intrastate rates to the pre-war basis.

#### 604. Changes in freight rates by carriers.

##### 604-A. RIGHT OF THE CARRIER TO CHANGE ITS RATES.

The provision of the Act that the published rate shall be the only lawful rate does not mean that a rate once fixed and published may never be changed, but that, when a change is made, it shall be made in the manner provided by law, namely, by publication, to the end that the new rate may be available to all shippers at the same time, on equal terms.<sup>1</sup>

A Court's decree enforcing an order of the Interstate Commerce Commission does not alter the administrative character of the order so as to prevent the carrier from making a change in the tariff affected, where necessity requires, and the provision for notice of change has been complied with.<sup>2</sup>

1. United States v. Standard Oil Co. (1907), 148 Fed. Rep. 719.

2. Interstate Commerce Commission v. Louisville & N. Rd. Co. (1896), 73 Fed. Rep. 409.

604-B. NO PRESUMPTION OF WRONG ARISES FROM A CHANGE IN RATES BY THE CARRIER.

In the case of *Interstate Commerce Commission v. Chicago, G. W. Rd. Co.*<sup>1</sup> the Supreme Court of the United States, per Mr. Justice Brewer said:

"It must be remembered that railroads are the private property of their owners; that while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet, in no proper sense, is the public a general manager. \* \* \* It must also be remembered that there is no presumption of wrong arising from a change of rate by a carrier. The presumption of honest intent and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life. Undoubtedly, when rates are changed, the carrier making the change must, when properly called upon, be able to give a good reason therefor; but the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done. Those presumptions of good faith and integrity which have been recognized for ages as attending human action have not been overthrown by any legislation in respect to common carriers."

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1. *Interstate Commerce Commission v. Chicago, G. W. Rd. Co.* (1908), 209 U. S. 108; 52 L. Ed. 705, 28 Sup. Ct. Rep. 493.

604-C. RATES IN EFFECT ON FEBRUARY 29, 1920, TO CONTINUE IN EFFECT UNTIL CHANGED BY GOVERNMENTAL AUTHORITY.

The Transportation Act of February 28, 1920, provided that all rates and charges and all regulations and practices, in anywise changing, affecting, or determining, any part or the aggregate of rates, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law.<sup>1</sup>

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1. *Transportation Act*, February 28, 1920, section 208.

604-D. REDUCTIONS IN RATES UNTIL SEPTEMBER 1, 1920, FORBIDDEN, UNLESS APPROVED BY INTERSTATE COMMERCE COMMISSION.

The Transportation Act of February 28, 1920, provided that prior to September 1, 1920, no rate, or charge, which were in effect on the lines of carriers subject to the Interstate Commerce Act on February 29, 1920, shall be reduced, and no regulation or practice shall be changed in such manner as to reduce such rate, or charge, unless such reduction or change is approved by the Interstate Commerce Commission.<sup>1</sup>

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1. *Transportation Act*, February 28, 1920, section 208.

## 605. Quotation of freight rates by carriers to shippers.

### 605-A. DUTY OF CARRIERS TO QUOTE RATES TO SHIPPERS.

Section 6 of the Act to Regulate Commerce (*as amended June 18, 1910*), reads as follows:

If any common carrier subject to the provisions of this Act, after written request made upon the agent of such carrier hereinafter in this section referred to, by any person or company for a written statement of the rate or charge applicable to a described shipment between stated places under the schedules or tariffs to which such carrier is a party, shall refuse or omit to give such written statement within a reasonable time, or shall misstate in writing the applicable rate, and if the person or company making such request suffers damage in consequence of such refusal or omission or in consequence of the misstatement of the rate, either through making the shipment over a line or route for which the proper rate is higher than the rate over another available line or route, or through entering into any sale or contract whereunder such person or company obligates himself or itself to make such shipment of freight at his or its cost, then the said carrier shall be liable to a penalty of two hundred and fifty dollars, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

It shall be the duty of every carrier by railroad to keep at all times conspicuously posted in every station where freight is received for transportation the name of an agent resident in the city, village, or town where such station is located, to whom application may be made for the information by this section required to be furnished on written request; and in case any carrier shall fail at any time to have such name so posted in any station, it shall be sufficient to address such request in substantially the following form: "The Station Agent of the \_\_\_\_\_ Company at \_\_\_\_\_ Station," together with the name of the proper post-office, inserting the name of the carrier company and of the station in the blanks, and to serve the same by depositing the request so addressed, with postage thereon prepaid, in any post-office.

It is the understanding of the Commission that under section 6 of the act carriers are required to make written statements as to rates only in relation to shipments about to be made or shipments affected by contracts about to be entered into, and that the provisions of that section do not require carriers to expend their time and labor in making such statements upon demands therefor by individuals wishing to issue books or notices of rates, or for other purely speculative purposes.<sup>1</sup>

It will be noted that the law does not provide for any redress to the shipper who may have suffered loss on account of an erroneous quotation of the tariff rate, for the reason that it has so far seemed impracticable to find any method of so doing without opening a loophole for the allowance of secret rebates in such manner as would be practically unprovable in criminal proceedings.

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1. Conf. Rul. Bul. Rule 457 (March 11, 1914).

### 605-B. QUOTATION ON SHIPPER'S APPLICATION OF RATE FOR SAILING, AND OTHER ACCRUING CHARGES.

Section 25 of the Interstate Commerce Act, (*Added, February 28, 1920*), contains the following provision:<sup>1</sup>

Upon application of any shipper a carrier by railroad shall make request for, and the carrier by water shall upon receipt of such request name, a specific rate applying for such sailing, and upon such commodity as shall be embraced in the inquiry, and shall name in connection with such rate, port charges, if any, which accrue in addition to the vessel's rates and are not otherwise published by the railway as in addition to or absorbed in the railway rate. Vessel rates, if conditioned upon quantity of shipment, must be so stated and separate rates may be provided for carload and less-than-carload shipments. The carrier by water, upon advices from a carrier by railroad, stating that the quoted rate is firmly accepted as applying upon a specifically named quantity of any commodity, shall, subject to such conditions as the Commission by regulation may prescribe, make firm reservation from unsold space in such steam vessel as shall be required for its transportation and shall so advise the carrier by railroad, in which advices shall be included the latest available information as to prospective sailing date of such vessel.

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1. Interstate Commerce Act, section 25 (2), added February 28, 1920.

**605-C. MISQUOTATION OF RATE BY AGENT DOES NOT AFFORD LAWFUL CHARGE.**

A misquotation by an agent of a railroad company of the amount of a freight charge on an interstate shipment, and its payment by the shipper, held, not to relieve him from liability for the lawful rate.<sup>1</sup>

See "*Payment for Transportation*," Chapter 19, post.

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1. Payne, Director General of Railroads, v. Clarke (1921), 271 Fed. Rep. 525.

**605-D. COMMISSION'S RATES TREATED AS EMBODIED IN STATUTE.**

Rates established in the tariff schedules filed by the railroads which had been found by the Interstate Commerce Commission to be reasonable, are to be treated as though they were embodied in the statute, binding as such upon both railroads and shippers alike.<sup>1</sup>

See "*Payment for Transportation*," Chapter 19, post.

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1. Keogh v. Chicago & N. W. Ry. Co. (1921), 271 Fed. Rep. 444.

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**606. ASSESSMENT OF FREIGHT RATES.****606-A. COLLECTION OF ESTABLISHED RATE ON SHIPMENT RECALLED BY THE SHIPPER.**

A shipment had moved 150 miles from the point of origin before the consignor discovered that an error had been made in filling the consignee's order. On inquiry by telephone he was informed by the carrier's clerk that the car could be returned without extra charge; and thereupon the consignor requested its return for a correction of the loading. A part of the carload was exchanged, the shipment was again billed out and moved to destination: *Held*, That the Commission can not relieve the carrier from the obligation of collecting the published rates for all the movements actually made.<sup>1</sup>

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1. Conf. Rul. Bul. Rule 248, (January 4, 1910).

**606-B. OUTBOUND CHARGES ON A SHIPMENT MAY NOT BE REFUNDED BY THE CARRIER AND CHARGED BACK AGAINST THE CONSIGNOR.**

A shipment having been accepted by the consignee at destination and removed to his place of business was subsequently returned to the delivering carrier, the outbound charges were refunded and included in the return waybill as advance charges. Upon delivery of the returned shipment to the original consignor the return charges, as well as such advance charges, were demanded and collected: *Held*, That the published rate for the extra movement was the only charge that the carrier could lawfully exact from the original consignor.<sup>1</sup>

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1. Conf. Rul. Bul. Rule 249, (January 4, 1910).

**606-C. TWO SMALL CARS FURNISHED BY CARRIER IN LIEU OF A LARGER CAR ORDERED BY THE SHIPPER.**

Upon informal complaints and numerous inquiries it is *Held*, That the act of a carrier in furnishing two small cars in lieu of the larger

car ordered by a shipper under appropriate tariff authority is binding, at the rate and minimum applicable to the car ordered, upon all the carriers that are parties to the joint rate under which the shipment moves from the point of origin; the shipper is entitled to all privileges in transit, to reconsignment, and to switching at the same charges as would be applicable under the joint tariff had the shipment been loaded into one car of the capacity ordered; and demurrage will likewise accrue on that basis. If the shipment moves beyond the point to which the joint rate applies, the connecting line or lines are entitled to and should collect their transit, reconsigning, switching, and demurrage charges as provided in their own tariffs.

In all cases the initial carrier will be liable for such additional charges as may be imposed on the shipper by reason of its failure to furnish a car of the capacity ordered. Carriers that are parties to the joint rate under which the shipment commenced to move may share in such additional expense so incurred by the initial carrier.<sup>1</sup>

In case a shipment leaves a point of origin in a single car and for the convenience of the carriers is transferred in transit into two cars which are subsequently detained at destination beyond the free time, demurrage should be assessed as for one car only, so long as either car is detained; and in such cases switching, reconsignment, and diversion charges should be assessed as for one car only.<sup>2</sup>

For a through shipment of an emigrant outfit the initial carrier, at the request of the consignor, furnished a 40-foot car which became out of order while on its line. At the junction point the connecting carrier transferred the shipment into two 36-foot cars, and in that form it moved to destination on the line of a third carrier. There was no joint through rate, but the second and third carriers maintained a rate for a 36-foot car, all weight in excess of a given minimum to be charged for proportionately, the tariff, however, expressly forbidding the use of larger equipment. At destination charges were collected on the basis of two carloads from the point of transfer: *Held*, That in transferring the shipment, the connecting carrier ought to have loaded the full minimum weight into one car and to have adjusted the charges on the balance of the shipment in the second car at the less-than-carload rate.<sup>3</sup>

A shipment started to move under a joint through rate and an established minimum for the car of the size in which it was loaded, but for the convenience of the carrier was subsequently transferred into a smaller car taking a lower minimum under the same through rate. Charges were collected on the actual weight, which was in excess of the lower and less than the higher minimum weight: *Held*, That where a joint through rate is in effect the through charges are not affected by such a transfer of the shipment in transit from one car to another whether larger or smaller; and that the through charges here should have been collected at the joint through rate and on the basis of the minimum weight applicable on the car ordered or accepted by the consignor for the movement.<sup>4</sup>

Where three connecting carriers publish a joint tariff under which they hold themselves out to the public as prepared to transport commodities in carload lots of a certain minimum magnitude at a certain specified rate, such carriers are by their tariff allowed to charge no more than the rate upon such carload, no matter what equipment they

may provide for its transportation, except as the tariff in specific terms provides certain minimum weights for carloads in cars of certain lengths or capacities.<sup>5</sup>

1. Conf. Rul. Bul. Rule 339, (February 5, 1912); Rule 66, Tariff Circular 18-A; General Chemical Co. v. Norfolk & W. Ry. Co. (1909), 15 I. C. C. Rep. 349; Milwaukee Falls Chair Co. v. Chicago, M. & St. P. Ry. Co. (1909), 16 I. C. C. Rep. 217; Conf. Rul. Bul. Rule 59 under Chapter 10, post; Noble v. Baltimore & O. Rd. Co. (1912), 22 I. C. C. Rep. 432; Conf. Rul. Bul. Rule 274 reaffirmed, with the understanding, however, that the duty of transferring the shipment rests upon the carriers and not necessarily upon the connecting carrier. (See Conf. Rul. Bul. Rule 357, *infra*, amending Conference Ruling 250).
2. Conf. Rul. Bul. Rule 357, (May 6, 1912), amending Conference Ruling 250; Scudder v. Texas & P. Ry. Co. (1910), 21 I. C. C. Rep. 60.
3. Conf. Rul. Bul. Rule 273, (March 15, 1910). Compare Conference Ruling 357, *supra*.
4. Conf. Rul. Bul. Rule 331, (November 14, 1911).
5. Pacific Purchasing Co. v. Chicago & N. W. Ry. Co. (1907), 12 I. C. C. Rep. 549.

**606-D. RATES CHARGEABLE ON A LARGER CAR FURNISHED FOR THE CONVENIENCE OF THE INITIAL CARRIER UNDER TARIFF AUTHORITY FOR APPLYING THE MINIMUM WEIGHT APPLICABLE ON THE SMALLER CAR ORDERED BY THE SHIPPER, WHERE THE CONNECTING LINE DOES NOT PUBLISH SUCH A TARIFF PROVISION.**

Complaints of alleged overcharges arise in connection with shipments that move over the lines of two or more carriers under combination rates, the initial carrier having a provision in its tariff that in case a car of certain dimensions or capacity is ordered by a shipper, and the carrier for its own convenience furnishes a larger car, such larger car may be used on the basis of the minimum weight applicable to the car ordered, while the connecting carrier does not have such tariff provision and therefore charges for the full minimum weight applicable to the car used.<sup>1</sup>

The law imposes upon carriers the obligation of arranging to every reasonable extent for through carriage and through shipment. Neither the burden of following his shipment to a connecting point between two carriers and there transferring it, nor of bearing the expense of such transfer, can be laid upon the shipper. It is not deemed reasonable that in a case of this kind the shipper should be required to pay higher charges than he would have paid had the initial carrier furnished the equipment that is provided for in its tariff and that was ordered by the shipper. The carriers in the different classification territories ought to have, and should provide at the earliest practicable moment, a uniform rule on this subject.<sup>2</sup>

It is believed that where the initial carrier provides in its tariffs that if for its own convenience it furnishes a car larger than that ordered by the shipper, it will be used upon the basis of minimum weight applicable to the car ordered, and the connecting carrier to or over whose lines such shipment is moved has not such provision in its tariff, the initial carrier should note upon the bill of lading and upon the way bill or transfer bill, which accompanies delivery of a shipment to its connections, the fact that car of certain size was ordered and car of certain size was for its own convenience furnished by the carrier to be used on the basis of the minimum weight applicable to the car ordered; and that connecting carrier, receiving such notice on the way bill or transfer bill and not having provision in its tariff which permits the

use of the car on the basis of the lower minimum weight, should transfer the shipment into car of the size or capacity ordered by the shipper or into car to which the same minimum weight applies, without additional expense to the shipper.<sup>3</sup>

This ruling outlines the policy which the Commission will follow in cases of this nature which may be brought before it. It is, of course, understood that shipper may not demand any car that is not provided for in the initial carrier's tariff.

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1. Conf. Rul. Bul. Rule 274, a. (March 15, 1910); See Rule 66, Tariff Circular 18-A.
  2. Conf. Rul. Bul. Rule 274, b. (March 15, 1910).
  3. Conf. Rul. Bul. Rule 274, c. (March 15, 1910); See Conf. Rul. Bul. Rule 339 under Section 606-C, supra.

#### 606-E. RATES APPLICABLE ON GASOLINE MOTOR CARS MOVING UNDER THEIR OWN POWER OVER CARRIER'S RAILS.

The movement of a gasoline motor car, from the manufacturer to the purchaser over the rails of a common carrier is transportation that is subject to the act, when between interstate points, notwithstanding the fact that it moves under its own power and is operated by employees of the manufacturer. Such transportation is lawful only when a rate for it has been duly published. Except on the commodities specifically enumerated in Section 1 of the Act, rates can not lawfully include the passage of attendants, and as gasoline motor cars are not so enumerated the attendants must pay fares on the basis of the regularly published passenger fare then in effect. In adjusting its rates the carrier should take into consideration the conditions surrounding the movement of traffic of this kind.<sup>1</sup>

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1. Conf. Rul. Bul. Rule 334. (January 9, 1912).

#### 606-F. CHARGES TO APPLY ON A PREPAID SHIPMENT THAT IS STOPPED AND DELIVERED AT AN INTERMEDIATE POINT.

Under transit tariffs requiring the payment of the full rate to final destination at the time the shipment is delivered at the transit point, it sometimes occurs that a shipment is never forwarded to the destination to which charges have been paid: *Held*, That it is not unlawful or improper in such cases to refund the charges that have been paid in excess of what the lawful charges on the shipment would have been if the transit point had been its final destination.<sup>1</sup>

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1. Conf. Rul. Bul. Rule 350 (April 1, 1912); Clifton Sugar Refining Co. v. Chicago & N. W. Ry. Co. (1913), 28 I. C. C. Rep. 364; Pillsbury Flour Mills Co. v. Great N. Ry. Co. (1916), 39 I. C. C. Rep. 353.

#### 606-G. INTERSTATE FREIGHT RATES MUST APPLY ACCORDING TO THE MOVEMENT OF THE TRAFFIC.

Upon the arrival of a shipment at the junction designated in the consignor's routing instructions it appeared that, because of a washout on its lines, the connecting carrier could not accept the movement. The shipper thereupon assumed custody of the shipment and forwarded it

by a water line. *Held*, That the carrier must collect its local rate to the junction point, and cannot apply its proportion of the through rate.<sup>1</sup>

In another case a mixed carload of meat, eastbound, was diverted at the Ohio River on account of a flood, and, by order of the shipper, was taken by a roundabout route to a point east of its destination, and from thence hauled westbound to destination. The mixed-carload rate applied on eastbound shipments, but the tariffs provided no mixed-carload rate on westbound shipments. *Held*, That such interruption of the eastbound movements would not justify the application of a mixed-carload rate on the westbound movement to destination.<sup>2</sup>

So it is an entirely erroneous assumption that, where there are two or more lines with different rates between two points, a shipper may secure the application of the lowest rate by either of such lines, regardless of which one he uses.<sup>3</sup>

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1. Conf. Rul. Bul. Rule 147, (February 9, 1909). See Conf. Rul. 83 under Section 1104-A, post.

2. Conf. Rul. Bul. Rule 52. (March 11, 1908).

3. Hill & Webb v. Missouri, K. & T. Ry. Co. (1909), 16 I. C. C. Rep. 569.

#### 606-H. ONLY ONE LEGAL RATE CAN EXIST BETWEEN TWO POINTS AT ANY GIVEN TIME.

See "*Only one legal rate can exist between any two points at any given time*," Section 602-A, ante.

#### 606-I. THE LEGAL RATE APPLICABLE TO AN INTERSTATE SHIPMENT IS THE PUBLISHED THROUGH RATE IN EFFECT AT THE TIME THE SHIPMENT IS RECEIVED BY THE CARRIER FOR TRANSPORTATION AND OVER THE ROUTE WHICH IT IS TO MOVE.

See "*The legal rate applicable to an interstate shipment is the published through rate in effect at the time the shipment is received by the carrier for transportation and over the route which it is to move*," Section 602-B, ante.

#### 606-J. RATES APPLICABLE ON SHIPMENTS TO COLON, PANAMA.

Colon, although within the geographical limits of the Canal Zone, is governed by and is under the sovereignty of the Republic of Panama. The Commission holds, therefore, that shipments from the United States to that point are entitled to export rates.<sup>1</sup>

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1. Conf. Rul. Bul. Rule 359, (May 13, 1912).

#### 606-K. RIGHT OF SHIPPER WITH REFERENCE TO THE MANNER OF SHIPPING A COMMODITY.

A shipper of goods has the right to refrain from assembling its ultimate product, or to disassemble the same, for shipment in any way that will make the shipment take a lower tariff rate than if the articles were in final form.<sup>1</sup>

Though a manufacturer of portable railway track did not attach to the rails the plates and bolts, although the sections consisted of two

steel rails and steel cross-ties, which were riveted together, *Held*, that the article was a "portable railway track set up in sections," within the tariff providing for that class of articles, and that the shipper was not entitled to the commodity tariff applicable on iron and steel rails and cross-ties.<sup>2\*</sup>

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1. Lakewood Engineering Co. v. New York, C. & H. R. Rd. Co. (1919), 259 Fed. Rep. 61, 170 C. C. A., 121. Case dismissed. Lakewood Engineering Co. v. New York C. Rd. Co. (1920), 254 U. S. 661, 65 L. Ed. 126, 4 Sup. ct. Rep. 60.
  2. *Ibid.*

#### 606-L. CONFLICTING RATES IN PUBLISHED TARIFF.

A carrier in reissuing a tariff brought forward certain rates originally named in a previous tariff, and also slightly increased the rates named between the same points on the same commodity in a supplement to the previous tariff: *Held*, That where a tariff contains conflicting rates the lower or lowest of the rates so published is the legal rate.<sup>1</sup>

Where conflicting rates are named in separate tariffs the rate first established is the legal rate, upon the principle that lawfully established rates remain in effect until specifically cancelled.<sup>2</sup>

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1. Conf. Rul. Bul. Rule 239, (December 6, 1909); Ireland & Rollings v. St. Louis & S. F. Rd. Co. (1912), 22 I. C. C. Rep. 590, 592.
  2. Highland Iron & Steel Co. v. Director General, as Agent, Baltimore & O. C. T. Rd. Co. (1920), 57 I. C. C. Rep. 547, 548; citing, Conf. Rul. Bul., Rule 50 (March 9, 1908); Conf. Rul. Bul., Rule 70 (May 5, 1908); Conf. Rul. Bul., Rule 104 (Nov. 9, 1908); New Albany Box & Basket Co. v. Illinois C. Rd. Co. (1909), 16 I. C. C. Rep. 315; Sun Co. v. Toledo & O. C. Ry. Co. (1918), 52 I. C. C. Rep. 12; Dewey Portland Cement Co. v. Atchison, T. & S. F. Ry. Co. (1920), 56 I. C. C. Rep. 444.

#### 606-M. RATES APPLICABLE ON MATERIALS FOR REPAIR OF CARS ON FOREIGN LINES.

A carrier on whose line a car was damaged made an order on a connecting line, which owned the car, for certain castings to be delivered to it at the junction of the two lines. *Held*, That the former line was a shipper over the line of the owing carrier and must pay the published rate.<sup>1</sup>

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1. Conf. Rul. Bul. 373 (October 8, 1912).

#### 606-N. SPECIAL RATE ON SHIPMENTS IN FOREIGN CARS.

A carrier may not by tariff limit the application of certain proportional rates to shipments in cars of other carriers.<sup>1</sup>

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1. Conf. Rul. Bul. Rule 470 (December 24, 1914).

#### 606-O. RATES ON CONSOLIDATED CARLOADS OF LESS-THAN-CARLOAD SHIPMENTS.

*Forwarding agent as consignor.*

The less-than-carload rate usually exceeds the carload rate upon the same commodity. If, therefore, several less-than-carload shipments can be bunched together and sent at the carload rate a material

saving results to the shippers, and this is especially true where the movement is over long distances and the rate considerable.<sup>1</sup>

For the purpose of making this saving shippers have been and are accustomed to combine by agreement among themselves their less-than-carload freight into carloads, consigning the carload to some individual at the destination point who makes the proper distribution. There has also come into existence a class of operators known as "forwarders" or forwarding agents whose business it is to solicit less-than-carload shipments to be combined and forwarded as carloads. The forwarder loads the car and ships it as a carload either in his own name or to some consignee as his agent at the point of distribution in making delivery to the various owners. The freight is paid to the railroad by the forwarder or his agent, who charges the shippers something less than the regular rate upon their less-than-carload shipments. The result of the transaction is that the railroad receives its published carload rate, the shippers pay less than the published less-than-carload rate, while the forwarder, for the service of assembling the freight, loading the car, making the shipment, and distributing the freight at destination, retains the difference between what it collects from the shippers and what it pays the railroad.<sup>2</sup>

The carriers for the purpose of preventing the transaction of this business, adopted a rule by which it was provided, in substance, that the carload rate should not be applied unless all the merchandise in the car was owned by one individual. Since, in point of fact, the combined carload is owned by several different individuals, and since this must, in the nature of things, be indicated by the marks upon the packages, the enforcement of this rule prevented the operations of the forwarder.<sup>3</sup>

One of these forwarding agents applied by complaint to the Commission in the case of *California Commercial Association v. Wells, Fargo & Co.*,<sup>4</sup> alleging that the above rule was unlawful under the Act to Regulate Commerce, inasmuch as the railroad had no business to inquire whether the entire carload was or was not owned by one person, and the Commission so held. In this case, a number of packages of merchandise, aggregating 16,000 pounds in weight, were assembled in New York by the complainant's agent and offered to the defendant at one time and one place, consigned under one bill of lading to the complainant, a voluntary association of San Francisco merchants. Defendant's tariff provided a rate of \$8.00 per 100 pounds for shipments of 10,000 and less than 20,000 pounds. Applying its rule as to "bulked shipments intended to be distributed by the consignee," the defendant charged its parcel rate against each separate package. The Commission held that the rule against "bulked shipments" is illegal; that the law does not justify the classification of shippers with regard to their interest in the property shipped; that the ownership of property tendered for shipment cannot be made a test as to the applicability of the carrier's rates; that in gathering several packages of goods together and shipping them under the carrier's rates on large shipments, a shipper is not by device evading the law, but is legally availing himself of the rates which the carrier offers; that the cost of carrying "bulked shipments" is not greater than the cost of carrying the same amount of freight at the instance of an individual owner; that the charge must therefore be the same in each case. The Commission said:

"The fundamental and large question involved in this case is the right of a carrier to determine what shippers may use its published rates. It is the contention of the defendant that it may refuse to grant the bulk rate (which in this case is analogous to the carload rate made by a railroad) to any but single owners of such shipments; that to permit any other use of the rate would be to induce many shippers of small packages (less than carload shippers) to unite their shipments in order to secure the lower rate applicable to large shipments, and thus the forwarding agency would come into being—an agency which could cut the package rate, render such rates unstable, grant preferences, and effect discriminations contrary to the spirit of the Act to Regulate Commerce. To protect themselves against the creation of such agencies, the rule has been drafted which has been quoted above. The effect of such rule has been seen in this case—a group of smaller merchants are denied a rate which a large merchant is given; they tender the same number of packages of the same weight, containing the same goods as the large department store which is their rival, and they are charged a rate of 50 per cent higher upon their shipments. A rule which works such a result cannot be based on solid principle, even though it may have most specious and persuasive reasons to support it.

"The express companies urge that unless such a rule is permitted, shippers will form such agencies and no one henceforth will be able to tell what the real package or the less-than-carload rate is. The forwarding agency will give to one shipper one rate, a second shipper another rate, a third another, and so the very purpose of the Act, the uniformity of rates as between shippers, will be destroyed. We do not know that this will be so, but it is theoretically possible. The one certain answer to this argument is that the carrier makes but one rate and applies it without favor to each shipment that is tendered—to the small shipment the rate that is applicable thereto, and to the large shipment its own fixed rate. The railroad or the express company offers to the world to transport a certain quantity of a certain character of freight for a certain definite amount of money, and it has no fair concern with the profit of the shipper or his interest in the property. It may ask that the shipment shall be what it purports to be in character and in weight, for that affects the rate; it may make reasonable rules to protect itself against a multiplicity of claims for loss or damage, for such claims ultimately affect the rate at which the carrier can afford to carry; it may refuse to accept the shipment except upon payment of the charges—these and, no doubt, other rules are properly within the carrier's prerogative, but we look in vain for authority to justify a classification of freight according to ownership. If we may hold as reasonable such a rule by which the utility of a rate is limited upon the carrier's knowledge of the persons to whom freight is really destined, we should be ready likewise to approve a rule which makes the right to use a rate depend upon the carrier's knowledge of the use to which the article is to be put by the ultimate consignee—whether a certain shipment of grain, for instance, is to be ground into flour, sown in the field, fed to cattle, or converted into liquor. Where can we logically stop if we depart from the simple tests which may be put by the carrier's agent at the time of shipment: (a) Who offers this shipment? (b) Of what does it consist? (c) To whom, and where, is it bound? For its purposes as common carrier the railroad or the express company needs no other information than may properly be elicited by these questions, and it would appear improper and unreasonable that it should be permitted to go into the vague and illimitable realms outside of and beyond such needs. The carrier deals with the shipment that is tendered, not with its ownership nor with its ultimate use; and it deals with the shipper who tenders it, not with the owner of the property or the last and most remote person to whom it is distributed. To veer from this straight course, no matter to how slight a degree or for what apparently beneficial purpose, is to lead away from the policy of the law which condemns discriminations and preferences."

In the case of *Export Shipping Company v. Wabash Rd. Co.*<sup>5</sup> the complainant delivered to defendants in Chicago for transportation to New York three carloads of freight consisting of a number of packages of various ownership, assembled by the complainant before delivery to the carrier, and each consigned under a single bill of lading to a single consignee. On arrival in New York City the delivering carrier refused to apply the carload rate, but in accordance with the note to Rule 5-B and Rule 15-E of the Official Classification then in force, assessed the less-than-carload rates. The Interstate Commerce Commission held that note to Rule 5-B and Rule 15-E were unlawful, basing its opinion on the case of *California Commercial Club v. Wells, Fargo & Company, supra.*

The Circuit Court for the Southern District of New York enjoined the order of the Commission,<sup>6</sup> but the Supreme Court of the United States, upon appeal, reversed the holding of the Circuit Court and sustained the order.<sup>7</sup>

The Supreme Court has apparently laid down in this case two propositions:

First: That where the order of the Commission depends upon a finding of fact the finding of the Commission is conclusive upon the court.

Second. That a carrier can not make the ownership of goods the measure of the rate which shall be applied.

The language of the court is as follows:

"As shown by the opinion of the Commission and that of the two members who dissented, there were many and wide differences in the views expressed. On their face, however, when ultimately reduced, they will be found, in so far as they are here susceptible of review, to rest on but a single legal proposition—that is, the right of a common carrier to make the ownership of goods tendered him for carriage the test of his duty to receive and carry, or, what is equivalent thereto, the right of a carrier to make the ownership of goods the criterion by which his charge for carriage is to be measured. We say the contentions all reduce themselves to this, because in their final analysis all the other differences, in so far as they do not rest upon the legal proposition just stated, are based upon conclusions of fact as to which the judgment of the Commission is not susceptible of review by the courts. (Baltimore & Ohio R. R. Co. v. Pitcairn, 215 U. S. 481.) This at once demonstrates the error committed by the lower court in basing its decree annulling the order of the Commission upon its approval and adoption of the reasons stated in the opinion of the dissenting members of the Commission. This follows, since the reasons given by the dissenting members, except in so far as they rested upon the legal proposition we have just stated, proceeded upon premises of fact, which, however cogent they may have been as a matter of original consideration, were not open to be so considered by the court, because they were foreclosed by the opinion of the Commission. Doubtless the mistake of the court below this respect was occasioned by overlooking the scope of the Hepburn Act and because the decision below was made in June, 1909, before the announcement of the opinion in the Pitcairn case. (Ib., 251-2.)"

In the case of *California Commercial Association v. Wells, Fargo & Co.*<sup>8</sup> the defendant's tariff provides that under certain circumstances two or more packages forwarded by one company, from the same point, on the same day, to one consignee, whether from one or more shippers, must be aggregated as to weights if a lower charge is thereby made. Upon complaint that this rule was not applied to certain shipments to which it should have been applied: *Held*, That the rule should have been applied to those shipments, and that charges collected thereon in excess of what would have been the charges if the rule had been applied were in excess of the lawful tariff charges and should be refunded.

A coffee broker purchased from three different merchants in New York three lots of coffee for shipment to one customer as one carload. The three lots were delivered to the carrier under circumstances that would have entitled them to go to destination as a carload shipment had proper instructions been given. Because of the failure of the shipper's agent to give such instructions the three lots went forward to destination as three shipments, at the less-than-carload rate. Upon inquiry by the carrier whether it might assess the carload rate: *Held*, That freight charges must be collected on the basis of the less-than-carload rate.<sup>9</sup>

*Owner of the goods as shipper of a consolidated carload.*

In the case of *The Buckeye Buggy Co. v. Cleveland, C. C. & St. L. Ry. Co.*<sup>10</sup> the Commission held, that before allowing a carload rating to a carload shipment a carrier is entitled to require that the goods shall be loaded at one time and place, that but a single bill of lading shall be issued, and that the shipment shall be from one consignor to one consignee, but that when the goods are so loaded and by the terms of sale become the property of the consignee upon delivery to the carrier, the carrier has no right to inquire whether the consignee obtained his title from one or several owners; and that if it accords the carload rate in

case the consignor is the owner, failure on its part to extend the same privilege when the consignee is the owner, violates Sections 1, 2 and 3 of the Act to Regulate Commerce.

The Commission ordered that the rule in defendant's classification covering the application of carload rates to carload lots should be so modified as to accord the same rating to consignor and consignee when the condition of ownership after the property is delivered to the carrier is the same.<sup>11</sup>

1. Twenty-Fifth Annual Report of I. C. C. (1911).
2. Ibid.
3. Ibid. The rule of the carriers referred to was the note to Rule 5-B and Rule 15-E of the Official Classification in effect in 1908.
4. California Commercial Association v. Wells, Fargo & Company (1908), 14 I. C. C. Rep. 422. Wells, Fargo & Co. v. Interstate Commerce Commission (C. C. S. D. N. Y.) Not reported. Pending the determination of the case of Export Shipping Company v. Wabash Rd. Co. (14 I. C. C. Rep. 437; 166 Fed. Rep. 499; 220 U. S. 235), the order in this case was suspended by the Commission. There was, therefore, no action by the court. California Commercial Association v. Wells, Fargo & Company (1911), 21 I. C. C. Rep. 300. Former order and decree adhered to.
5. Export Shipping Co. v. Wabash Rd. Co. (1908), 14 I. C. C. Rep. 437.
6. Delaware, L. & W. Rd. Co. v. Interstate Commerce Commission (1908), 166 Fed. Rep. 499. In Delaware, L. & W. Rd. Co. v. Interstate Commerce Commission (1909), 169 Fed. Rep. 894, in granting application of the American Forwarding Co., Trans-continental Freight Co., and Rockford Manufacturers' & Shippers' Association to intervene as parties defendant the court said: "It is not to be understood as sanctioning a practice which would allow every interested person to intervene in proceedings of this nature."
7. Interstate Commerce Commission v. Delaware, L. & W. Rd. Co. (1911), 220 U. S. 235; 31 Sup. Ct. Rep. 392; 55 L. Ed. 448.
8. California Commercial Association v. Wells, Fargo & Co. (1909), 16 I. C. C. Rep. 458.
9. Conf. Rul. Bul. Rule 175, (May 4, 1909).
10. The Buckeye Buggy Co. v. Cleveland, C. C. & St. L. Ry. Co. (1903), 9 I. C. C. Rep. 620, applied and followed in Bell Co. v. Baltimore & O. S. W. Rd. Co. (1903), 9 I. C. C. Rep. 637.
11. Ibid.

#### 606-P. IN THE ASSESSMENT OF FREIGHT RATES THE TRUE CHARACTER OF THE COMMODITY CONTROLS.

In the case of *Joseph Iron Co. v. Cornwall & L. Rd. Co.*<sup>1</sup> the complainant made a shipment weighing 40,400 pounds, over defendant's lines from Cordele, Ga., to Lebanon, Pa., consisting of large square pieces of worn-out cotton-press machinery. It was originally billed as scrap iron; but an agent of the Southern Weighing and Inspection Bureau, at Savannah, Ga., changed the billing to read "cotton-compressed machinery" because, as noted on the way bill, the machinery had not been broken into scraps or pieces, as required by a provision in connection with the rating on scrap iron in the Southern Classification. Charges were collected in the sum of \$218.16, at a rate of 54 cents per 100 pounds, applicable on cotton-compressed machinery. At the time the shipment moved a carload commodity rate of \$5.10 per net ton applied over the route of movement from point of origin to destination on "scrap iron, and scrap steel, all kinds, except old rails suitable for relaying purposes." This rate was published in an agency tariff, which excepts the commodity rates on scrap iron and scrap steel named therein from the application of the Southern Classification descriptions and rules. The evidence introduced for complainant shows that the material in question was damaged to such an extent that it was of no value except as scrap iron; that it was not further broken up at point of origin because of lack of facilities; that it was purchased and

sold by complainant as scrap iron; and that it was ultimately broken up by machinery and used for remelting purposes: *Held*, that the shipment consisted of scrap iron to which the rate charged was inapplicable; that the complainant has been damaged to the extent of the difference between the charges paid and those that would have accrued at the applicable rate of \$5.10 per net ton; and that it is entitled to reparation in the sum of \$115.14 with interest.

In the case of *Joseph Iron Co. v. Morgan's L. & T. Rd. & S. S. Co.*<sup>2</sup> the complainant made a shipment of 207,200 pounds consisting of worn-out scrap-iron rails, which were used for remelting purposes, from Algiers, La. to Richmond, Va. They were purchased from Morgan's Louisiana & Texas Railroad & Steamship Company, F. O. B. New Orleans, La., from which point they were transported from Algiers deadhead as Company material. They were shipped from New Orleans to Richmond over the Louisville & Nashville and the Atlanta & West Point railroads, Western Railway of Alabama, and the Georgia and the Atlantic Coast Line railroads. Charges were collected in the sum of \$634.54, at a joint commodity rate of \$6.86 per long ton.

At the time the shipment moved defendants maintained a rate of \$4.50 per net ton on scrap iron from New Orleans to Richmond, and complainant cited a rate of \$4.30 per net ton contemporaneously applicable on scrap-iron rails from New Orleans to Youngstown, Ohio, and Sharon, Pa. The Louisville & Nashville, expressed a willingness to establish a rate on old scrap iron rails, unsuitable for relaying purposes, from New Orleans to Richmond not higher than the rate contemporaneously applicable on scrap iron from and to these points, and to make reparation on that basis.

The Commission found that the rate charged was legally applicable, but that it was, and for the future will be, unreasonable to the extent that it exceeded or may exceed the rate contemporaneously applicable on scrap iron, in carload, from and to the same point; that the complainant had been damaged to the extent of the difference between the charges paid and those that would have accrued at the rate herein found reasonable; and that it is entitled to reparation in the sum of \$168.34, with interest.

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1. *Joseph Iron Co. v. Cornwall & L. Rd. Co.* (1918), 49 I. C. C. Rep. 111.
  2. *Joseph Iron Co. v. Morgan's L. & T. Rd. & S. S. Co.* (1918), 50 I. C. C. Rep. 107. See *Cohen-Schwartz's Rail & Steel Co. v. Morgan's L. & T. Rd. & S. S. Co.* (1920), 57 I. C. C. Rep. 479.

#### 606-Q. RATE TO GOVERN TRANSPORTATION SERVICE THAT HAS BEEN RENDERED FOR WHICH THERE IS NO TARIFF AUTHORITY.

Where a transportation service has been rendered for which no tariff authority whatever exists and where the shipper has paid the sum claimed by the carrier for that service, the Commission has jurisdiction to inquire what was a reasonable charge for the service and to order the repayment of whatever the carrier had collected over and above such reasonable charge.<sup>1</sup>

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1. *Memphis Freight Bureau v. Kansas City S. Ry. Co.* (1909), 17 I. C. C. Rep. 90. See able dissenting opinion in this case by Mr. Commissioner Cockrell, denying jurisdiction of the Interstate Commerce Commission to fix a charge for trans-

portation service rendered without tariff authority. *Zelnicker Supply Co. v. Louisiana W. Rd. Co.* (1919), 52 I. C. C. Rep. 543; *Cohen-Schwartz Rail & Steel Co. v. Morgan's L. & T. Rd. & S. S. Co.* (1920), 57 I. C. C. Rep. 479, 480; *Wharton Steel Co. v. Director General, as Agent, Central Rd. Co. of N. J.* (1920), 59 I. C. C. Rep. 11, 22; *Gateway Produce Co., Inc. v. American Railway Express Co.* (1921), 61 I. C. C. Rep. 347, 348.

#### 606-R. DUTY OF SHIPPER TO OBSERVE TARIFF PROVISIONS.

The law imposes upon shippers the duty of ascertaining the rates and conditions under which they ship, and non-compliance by shipper with tariff rules afford no basis for a finding that the rate legally applicable is unreasonable or otherwise unlawful or for authorizing a waiver of their observance.<sup>1</sup>

For a full discussion of this subject see, "*Payment for Transportation*," *Chapter 19, post.*

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1. *United Verde Extension Mining Co. v. Director General, Baltimore & O. Rd. Co.* (1920), 57 I. C. C. Rep. 483, 484; citing, *Maloney Tank Mfg. Co. v. St. Louis & S. F. Rd. Co.* (1917), 42 I. C. C. Rep. 605; *Good-Hopkins Lumber Co. v. Great Northern Ry. Co.* (1918), 51 I. C. C. Rep. 99.

#### 607. Payment for Transportation.

The Interstate Commerce Act (*as amended February 28, 1920*), contains the following provisions:<sup>1</sup>

From and after July 1, 1920, no carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges to prevent unjust discrimination; Provided, That the provisions of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia.

For full discussion of this subject see, "*Payment for Transportation*," *Chapter 19, post.*

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1. Interstate Commerce Act, Section 3 (2), added by amendment of February 28, 1920.

#### 608. Factors and elements in rate-making.

##### 608-A. VALUE OF SERVICE TO THE SHIPPER.

The value of the service to the article transported is an element of highest importance in fixing rates.<sup>1</sup> The value of the service to a shipper in a general sense is the ability to reach a market and make his commodity a subject of commerce. In this sense the service is more valuable to a man who transports a thousand miles than to a man who transports a hundred miles, so that distance is an element of the value of service. In a more definite and accurate sense it consists in reaching a market at a profit, being in effect *what the traffic will bear* to be remunerative to the producer or dealer. If the charge for service leaves no profit to the shipper the traffic is worthless and necessarily ceases.<sup>2</sup> In the case of coal, for example, the intrinsic value of the service to a miner forty or fifty miles farther from the common market is greater in proportion to its distance than to the nearer mine, but relatively on account of the cost of production, or a somewhat

inferior quality, it may be of no greater. If the remote mine can not sell at more profit the service has the same value for it and the traffic will bear no more.<sup>3</sup>

*In Re Investigation and Suspension Docket 26 to 26C<sup>4</sup>* the Commission said: "Is a rate unreasonable because it does not pay its full share of taxes, fixed charges and dividends? At the end this is the question to which we come in this case. The carriers themselves having fixed these rates under the mandate of the law that they shall fix just and reasonable rates, have they justified higher rates by showing that the existing rates which they had fixed fall somewhat short of meeting all the related expenses which the carrier must bear, not only for transportation but to secure an adequate return upon its property? Let us see where this doctrine would lead. If a carrier may raise all rates to a basis where each will bear its share of cost, including all costs, and no lower rate is reasonable, then must follow that all rates are unreasonable which yield to the carrier a greater return than such cost. Under such theory what would be the rate on tea or silks, or high-priced horses, or delicate machines? Is there to be no classification of freight excepting upon the basis of cost of transportation plus insurance risk? If so the tariffs of every railroad in the United States must suffer a revolutionary change. In all classification consideration must be given to what may be termed public policy, the advantage to the community of having some kind of freight carried at a less rate than other kinds. And this is the true meaning of the phrase 'what the traffic will bear.' It expresses the consideration that must be shown by the traffic manager to the need of the people for certain commodities. He accordingly imposes a higher rate upon what may be termed luxuries as compared with that imposed upon those articles for which there is a more universal demand. He also gives consideration to the fact that the rate so imposed enters into the ultimate price to the consumer to but a small degree when the article is one of high value, and that those in the community who can afford to purchase such articles can well afford to pay a rate greater than that which could reasonably be imposed upon the general public for commodities for common use. In this sense what the traffic will bear and the value of the service is analogous. No one would claim that a carrier was violating its duty under the law in charging three times the rate upon oriental rugs that it imposed upon cotton. This would not be undue discrimination as between commodities, even though it costs no more to transport the rugs than it did the cotton, assuming both to be carried at the owner's risk, for the one does not compete with the other, and one may reasonably bear a higher rate than the other upon public grounds."

Whether traffic will move at a given rate is always some evidence as to whether the rate responds to the value of the service performed.<sup>5</sup> However, the value of the service rendered is not conclusive of the reasonableness of the schedule; it must be judged in the light of its general purpose.<sup>6</sup>

Rates should bear a fair and reasonable relation to the antecedent cost of the traffic as delivered to the carrier for transportation, and the average market price the freight will command; but the burden is upon a party invoking this rule to establish by satisfactory evidence such antecedent cost and market value.<sup>7</sup>

Where the market price yields but a scant return the labor and expense of production the cost of transportation needs to be as moderate as may be consistent with justice to the carrier.<sup>8</sup>

If some commodities and the industries that use them can well stand rates that yield a liberal profit to the carrier it can afford to transport at low rates other commodities that could not move except under low rates, and so the commerce and welfare of the country is promoted, as it must be, by the widest possible general diffusion and exchange of the products of the mine, the forest, the farm, the mill, the furnace, and the factory.<sup>9</sup>

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1. Thurber v. New York, C. & H. Rd. Co. (1890), 3 I. C. C. Rep. 473, 2 I. C. Rep. 742.
  2. Imperial Coal Co. v. Pittsburg & L. E. Rd. Co. (1889), 2 I. C. C. Rep. 618; 2 I. C. Rep. 436.
  3. *Ibid.*
  4. In Re Investigation and Suspension of Advances in Rates for Transportation of Coal by Chesapeake & O. Ry Co. (1912), 22 I. C. C. Rep. 604, 623. See National Hay Assn. v. Michigan C. Rd. Co. (1910), 19 I. C. C. Rep. 34, 47; Memphis Cotton Oil Co. v. Illinois C. Rd. Co. (1909), 17 I. C. C. Rep. 313, 318; Interstate Commerce Commission v. Chicago G. W. Ry. Co. (1905), 141 Fed. Rep. 1003, 1015.
  5. Southern P. Co. v. United States (1912), 197 Fed. Rep. 167, 171.
  6. Wilson Produce Co. v. Pennsylvania Rd. Co. (1908), 14 I. C. C. Rep. 170, 175.
  7. Loud v. South Carolina Ry. Co. (1892), 5 I. C. C. Rep. 529; 4 I. C. Rep. 205; citing, Delaware State Grange v. New York, P. & N. Rd. Co. (1891), 4 I. C. C. Rep. 588; 3 I. C. Rep. 554.
  8. Newland v. Northern P. Rd. Co. (1893), 6 I. C. C. Rep. 131; 4 I. C. Rep. 474.
  9. Coke Producers Assn. of the Connellsville Region v. Baltimore & O. Rd. Co. (1913), 27 I. C. C. Rep. 125, 132.

#### 608-B. COST OF SERVICE TO THE CARRIER.

In fixing upon a rate or rate adjustment a carrier may always consider the cost of service and that factor should have great influence with the Commission in passing upon the reasonableness of the carrier's action.<sup>1</sup> While, however, in determining rates to be charged for transportation, cost of service is one of the principal elements to be considered, yet it is not to be considered alone as controlling.<sup>2</sup> Such cost can be reached approximately but not accurately enough to make it controlling.<sup>3</sup> On that basis some articles, on account of relation of commercial value to cost of service through furnishing a large volume of traffic, would not be carried at all, and on others of high commercial value we have a very low rate without increasing tonnage.<sup>4</sup> The public interests are not to be subordinated to those of the carriers, and require proper regard for the value of the service in the apportionment of all charges upon traffic.<sup>5</sup>

In *Louisville & Nashville Railroad Coal and Coke Rates*,<sup>6</sup> the Interstate Commerce Commission said: "We realize that there is no exact method of so separating the accounts of a carrier as to determine exactly what is the cost of moving any particular portion of its traffic and that the best that may be accomplished is an approximation \* \* \*. While cost is an important element in determining the reasonableness of freight rates, it is not controlling, and we do not think a reasonable maximum rate is *ipso facto* only such a rate as pays a fixed distributive share of all operating expenses.

"So long as freight is classified this cannot be, and the preservation of that classification calls for the exercise of 'flexible limit of judg-

ment which belongs to the power to fix rates.' *Atlantic Coast Line R. C. Co. v. N. C. Corporation Commission*, 206 U. S. 1, 26. While, in their own way, defendants have attempted to show the cost of transporting coal and coke from these mines and ovens, the following expression of the Supreme Court in *M. & St. L. R. R. Co. v. Minnesota*, 186 U. S. 257, 266, 267, is pertinent:

"The difficulty with defendant's case is that it made no attempt to show the cost of carrying coal in carload lots, and that even in proving that the cost of transporting ALL merchandise exceeded the rate fixed by the Commission on this coal, the interest upon bonds and dividends upon stock were included in the operating expenses. The propriety of the first is at least doubtful, the impropriety of the second is plain. We do not intend, however, to intimate that the road is not entitled to something more than operating expenses \* \* \*. We do not think it beyond the power of the state commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business."

While cost of service is a most material factor to be considered in the determination of the freight rates, it is not the only factor. The rate cannot vary between every station according to the grades or other physical incident of the transportation.<sup>7</sup> Carriers may not carry traffic at less than the cost of the service and so unduly burden other traffic.<sup>8</sup>

In *Northern P. Ry. Co. v. North Dakota*<sup>9</sup> the United States Supreme Court held that the cost of the transportation of a particular commodity which must be considered when determining whether the maximum intrastate rates fixed by the state for the carriage of such commodity are adequate or confiscatory includes all the outlays which pertain to such transportation, there being no basis for distinguishing in this respect between so-called "out-of-pocket cost," or "actual" expenses, and other outlays which are none the less actually made because they are applicable to all traffic instead of being exclusively included in the traffic in question.

In *American Bound Bale Press Co. v. Atchison T. & S. F. Ry. Co.*<sup>10</sup> the Interstate Commerce Commission said: "While, as a general proposition, it is true that the relative expense of different services is an important factor in the determination of proper charges for those services, yet there are certain limitations upon that proposition which we are bound to consider. Cost of service is usually so difficult of accurate determination that its use as a gauge in rate making must be limited; and its application is further narrowed by the consideration that it is but one of a number of factors, some of which, as value of service to the shipper, are of dominant importance. There are, moreover, reasons why the influence of cost should be more restricted as a factor in determining rates on different packages of the same commodity, than when the rates are applicable to entirely different commodities. Were it allowed full play it might in the case of some commodities lead to such a multiplication of rates and complication of tariffs as would be highly undesirable, and tend to destroy equality of opportunity in transportation. It was pointed out in the *Planters' Compress Co. case*, that the logical and complete application would lead to establishment of different rates upon cotton dependent upon the density to which it was compressed. The considerable amount of cotton grown near the various concentration points and brought into them by wagon, which would not require concentration service, would also call for a proper rate; moreover, the blanketing of the same rate over a wide territory, though a practice which is of great value and

which has been approved by this Commission, would not be permissible under the doctrine urged by complainants; for to haul a shipment to a definite point from the far side of an extensive blanket involves a greater cost than from the near side. This is illustrated by the rate on cotton from Texas common points to Galveston, where the same rate is applied on hauls ranging from 160 to 500 miles.

"Considerations such as the foregoing lead us once more to repeat what we said in the *Planters' Compress Co. case*, at page 405:

"If the rate on a given article is reasonable to those who ship the great bulk of that article in the form in which it is commonly prepared for transportation, that rate in our opinion does not become unreasonable to the shipper of a small quantity of the same article merely because he chooses to prepare his shipments in a form which affords the carrier the greater profit per 100 pounds."

With regard to the relationship which rates on live stock should bear to those on fresh meats and products, the Commission has held that in fixing rates on competitive articles the relation should be determined on the basis of the difference in the cost of service in the transportation of such articles, and that many of the other considerations entering into the establishment of rates upon independent or isolated articles should be in large part eliminated.<sup>11</sup> In the case of *Decker & Sons v. Chicago M. & St. P. Ry. Co.*<sup>12</sup> the Interstate Commerce Commission said: "The evidence of record does not clearly explain why the rates on fresh meat and packing-house products are the same from so many of these points. Certainly it is not the universal custom to quote the same rate on both. Fresh meat is more difficult to preserve in transit than packing-house products, is more difficult to handle, and loads lighter by 5,000 or 6,000 pounds to the car. Not only do these differences frequently result in a higher rate on fresh meat than on packing-house products, but this Commission, by establishing higher rates on that commodity than on packing-house products has repeatedly recognized the comparatively greater cost of transporting fresh meat."

In the end there must be a relation between the cost of service and the charge to the public for that service. If the character of the service performed is so changed by public mandate as to increase the expense of performing that service by 20 per cent, then the public must expect to pay 20 per cent more for the performance. It is therefore for the public interest that every transportation service should be performed by the most economical method, since that must ultimately result in the lowest transportation charge. Looking at this matter exclusively from the transportation standpoint, the carload system should, if possible, be retained upon the score of economy.<sup>13</sup>

Regulations for the transportation of dynamite and black powder require examination of car before shipment, certification of absence of defects, placarding of car as containing explosives, and lay down certain restrictions in shifting, handling and placing the loaded car. These precautions add to the cost of transporting explosives, but do not attach to smokeless powder or other inflammables. The cost of the maintenance of an efficient supervision over explosives and dangerous articles in transportation justifies a higher rate thereon than upon articles not so vigilantly guarded, and reasonably a proportionate amount of this extra cost should attach to the particular commodity involved.<sup>14</sup>

It probably cost the carriers as much to transport the lower grades of oil as it does to transport the refined oils, but the value of the former is much less, and frequently they cannot move at as high a rate.<sup>15</sup>

1. Business Men's League v. Atchison T. & S. F. Ry. Co. (1902), 9 I. C. C. Rep. 318.
2. Glade Coal Co. v. Baltimore & O. Rd. Co. (1904), 10 I. C. C. Rep. 226; Thurber v. New York, C. & H. R. Rd. Co. (1890), 3 I. C. C. Rep. 473; 2 I. C. Rep. 742; Society of American Florists and Ornamental Horticulturists v. United States Express Co. (1907), 12 I. C. C. Rep. 121.
3. Interstate Commerce Commission v. Chicago G. W. Ry. Co. (1905), 141 Fed. Rep. 1003, 1015; affirmed, Interstate Commerce Commission v. Chicago G. W. Ry. Co. (1908), 209 U. S. 108, 52 L. Ed. 705, 208 Sup. Ct. Rep. 493.
4. Thurber v. New York C. & H. Rd. Co. (1890), 3 I. C. C. Rep. 473, 2 I. C. Rep. 742.
5. Ibid.
6. Louisville & Nashville Railroad Coal & Coke Rates (1913), 26 I. C. C. Rep. 20, 27 et seq. See Pittsburgh Vein Operators' Association of Ohio v. Pennsylvania Co. (1912), 24 I. C. C. Rep. 280, 284; reaffirmed In the Matter of Rates, Practices, Rules and Regulations Governing the Transportation of Anthracite Coal (1915), 35 I. C. C. Rep. 220, 263.
7. Boston Chamber of Commerce v. Atchison T. & S. F. Ry. Co. (1913), 28 I. C. C. Rep. 230, 232.
8. Chamber of Commerce of the State of New York v. New York C. & H. R. Rd. Co. (1912), 24 I. C. C. Rep. 55, 75.
9. Northern P. Ry. Co. v. North Dakota (1915), 236 U. S. 585, 35 Sup. Ct. Rep. 429, 59 L. Ed. 735.
10. American Round Bale Press Co. v. Atchison T. & S. F. Ry. Co. (1914), 32 I. C. C. Rep. 458, 466, et seq.
11. Dietz Lumber Co. v. Atchison T. & S. F. Ry. Co. (1911), 22 I. C. C. Rep. 75, 81.
12. Decker & Sons v. Chicago M. & St. P. Ry. Co. (1914), 30 I. C. C. Rep. 547, 548.
13. Albree v. Boston & M. Rd. Co. (1912), 22 I. C. C. Rep. 306, 316.
14. United States v. Wharton & N. Rd. Co. (1913), 26 I. C. C. Rep. 309, 311.
15. American Refining Co. v. St. Louis & S. F. Rd. Co. (1914), 30 I. C. C. Rep. 103, 104.

#### 608-C. VALUE OF SERVICE VERSUS COST OF SERVICE.

In the case of *Boileau v. Pittsburgh & L. E. Rd. Co.*<sup>1</sup> the Interstate Commerce Commission said: "To be sure costs do not determine rates; yet most rates have within them as a constituent the element of cost. Cost is generally an important element in arriving at a judgment with respect to a rate. What weight shall be given to that element as compared with all the other elements entering into a particular rate, such as the value of the service, with its bundle of constituents, and the various conditions surrounding the particular traffic, is a matter to be decided in each individual case. Questions regarding the calculation of the cost of service and the weight to be given to such cost suggest controversies which are as old as the railway itself. As between the two cardinal principles of rate making—the cost of the service and the value of the service—the first is decidedly more capable of exact determination and mathematical expression than the latter. If, as some would have us believe, no measure has yet been discovered for ascertaining the cost of the service, what measure is there suggesting anything definite and tangible and sufficiently practical in its application to carry conviction which can be applied to the value of the service? By which, after all, we mean to say little more than that the cost of the service is ascertainable with much more precision and capable of more tangible expression than the value of the service. Nevertheless both cost and value must be considered as well as all other elements entering into a rate."

In the proceeding entitled "*In Re Investigation of Advances in Rates by Carriers in Western Trunk Lines, Trans-Missouri, and Illinois Freight Committee Territories*"<sup>2</sup> the Interstate Commerce Commission made the following interesting statement: "What has be-

come, meantime, of the theory of the reasonable rate based on the value of the service? The carrier finds itself in a position to command with supporting law a higher rate and reaches out to get it. This is not the-least-possible-rate-that-the-traffic-will-bear theory. It is the abandonment. It is the recognition of the class rates as reasonable rates toward which all rates should tend, and to which the carrier will, when it can, bring all rates. Commodity rates are in this view concessions from the reasonable rates. To press all rates upward to a fixed standard is not adjusting rates to meet specific conditions, nor is it 'developing traffic,' nor is it 'stimulating competition between markets.' What becomes of these fine phrases if there is recognized in the railroad man's mind the thought that rates should be elevated when other carriers and a conserving law will support such action? Can it be that the only forces which the carriers have recognized are competition between each other (which has now become less intense, or perhaps more rational) and the pressure of shippers to reach as far from home as possible to supply wide markets? And when this competition is nullified or minimized, and the pressure need not be yielded to—is there then a standard of rates which the carrier finds reasonable and just, one which the conscience of the traffic man will approve as neither oppressive to railroad nor to shipper?

"This approaches or at least looks toward a recognition of the idea that rates should not be as unstable as air; that in practice they cannot be without violating the canons of fair dealing as between industries and communities. Indeed, it is far on the way to a recognition that there may be some intimate relation between cost of service and rate of charge; that all markets cannot be open to every producing point; that shippers must enjoy and suffer the advantages and disadvantages of their location and adjust themselves to the transportation situation; that it is not within the province of the railroad to 'make' one city as against another, or unmake one industry to satisfy the eager competition of another industry, and a carrier's desire for tonnage. And possibly it is not too much to hope that in some good day some traffic manager will announce the principle, that a railroad's function is to sell transportation at a fair rate; and that it is beside his place to be the ultimate regulator of the economic condition of the country.

"To be sure we can never depart from the *ad valorem* principle in the making of rates. No governmental railway system does. The national highways may as properly tax a carload of tea with some relation to its value as the state may tax an import on the same basis, or the toll road distinguish between the automobile and the wheelbarrow. In all charges of an arbitrary character where public policy is involved there is need that the greater burden shall fall upon those best able to support it. But classification of freight cares for value in the greater part.

"In a land as intimately bound together in commerce as is this, where each city, village, and farm depends to large degree upon the resources of a nation for its supplies, there must arise questions of public welfare in the charges that the highways of the public may make altogether aside from questions of discrimination. It concerns us that we shall have the advantages of our varied resources; that New York and Chicago shall be made accessible to the fruit of Florida

and California; that Minneapolis and Buffalo shall serve the thickly populated eastern states with their flour; that the wide plains of Texas and Wyoming shall be brought as near as possible to the cattle-consuming centers; that coal and lumber shall go where fuel and trees are scarce; and that, in short, our products and our people may be as mobile and as fluent as conditions may permit. Therefore, it may not answer public needs to always measure rates by any fixed standard, but the deviations from standard should be made primarily with an eye to public advantage, rather than to the volume of freight which a carrier may secure. This is not a far departure from that policy which the old carriers of the more congested portions of our country have in recent years adopted. First, a basic classification of commodities with relation to their relative value, bulk, fragility, and other proper transportation considerations, upon which is built a wisely balanced schedule of charges fixed with reference to well-defined zones of distributive territory; and, beneath these, those special rates on certain commodities as to which the public need demands that exceptions shall be made.

"This makes for the rigidity of rates, it is said. Unquestionably. Do agreements between carriers that they will not advance or lower rates without notice to each other make for easy flexibility? Yet this was railroad policy for many years. Do conferences between carriers' traffic managers, the establishment of common agents to file common tariffs, the mutual notification of each carrier as to what is proposed by every other—are these devices of the carriers made to promote ready change and individual initiative or are they the well-designed machinery of the roads to put a brake upon change, a veto on troublesome flexibility?

"It is not necessary to direct attention to the act to regulate commerce in this respect, almost every section of which is grounded on the legislative belief that certainty and stability of rates are virtues much to be desired. The very latest expression of this belief is found in those provisions of the Mann-Elkins bill touching rates put in to meet water competition, and the new section 15 relating to rate suspensions, under which we are at present acting, all of which comes to this: The railroads long since sought to make rates stable by conventions, fines, and gentlemen's agreements. They saw the evils of unrestricted flexibility, which meant adjustment of rates to the ambitions of the carrier. They could not live with each traffic manager from day to day discovering by instinct the reasonable rate. The Government now comes in this same path and seeks to stay the changes which caprice or a carrier's selfishness may dictate. And we ask the carriers, Why is this present rate, which you fixed yourself, unreasonably low, if, as you say, cost of service is not to be considered? The answer comes that cost of service is now to be considered; that the traffic will now bear a higher rate; that its movement will not be impeded if a greater charge is made. Still seeking, we inquire again, Why was not such a higher rate imposed long ago? The answer is, We could not maintain it; the pressure of shippers and carriers was too strong. May we not ask one more question, Why do you then seek it now? And should not the answer be, Because we think we can get it. We are united in mind and the law will safeguard our right to it.

“The reasonable rate was one that could be secured. That definition remains as the carriers’ guiding star. But under regulation the reasonable rate is one which the shipper should pay in justice to the carrier which renders the service. Once the theory of bargain and sale of transportation is abandoned the rate becomes a matter for ascertainment by some method other than what the shipper can give or what the carrier will take. The railroad has a service to sell. The shipper wishes to buy this service. The law says these two may not haggle as to price. How, then, can the value of the service to the shipper in the accustomed sense of that phrase be discovered? Does not frankness require the answer that no such method is now possible? The individual shipper has by the course of law been transformed into the general public. The carrier has by like process been transformed into a public agency. The law says to the carrier that it may as to all men make its charges with relation to the value of the service it offers to all, and if it fixes this value upon considerations which are outside its functions as a public agency—if it seeks, for instance, to make itself the beneficiary of the prosperity of private industry, the law will interpose to correct its charges.”

See “*Charging ‘what the traffic will bear’*” Section 608-D, *infra* and “*Value of service versus cost of service,*” Section 507-C, *ante*.

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1. Boileau v. Pittsburgh & L. E. Rd. Co. (1912), 22 I. C. C. Rep. 640, 650.

2. In Re Investigation of Advances in Rates by Carriers in Western Trunk Lines, Trans-Missouri, and Illinois Freight Committee Territories (1911), 20 I. C. C. Rep. 307, 354, et seq.

#### 608-D. CHARGING “WHAT THE TRAFFIC WILL BEAR.”

In the proceeding entitled *In the Matter of the Investigation and Suspension of Advances in the Rates for Transportation of Coal by the Chesapeake & O. Rd. Co. et al. and Other Connections*<sup>1</sup> the Interstate Commerce Commission said: “Is a rate unreasonable because it does not pay its full share of taxes, fixed charges, and dividends? At the end this is the question to which we come in this case. The carriers themselves having fixed these rates under the mandate of the law that they shall fix just and reasonable rates, have they justified higher rates by showing that the existing rates which they had fixed fall somewhat short of meeting all the related expenses which the carrier must bear, not only for transportation but to secure an adequate return upon its property? Let us see where this doctrine would lead. If a carrier may raise all rates to a basis where each will bear its share of cost, including all costs, and no lower rate is reasonable, then it must follow that all rates are unreasonable which yield to the carrier a greater return than such cost. Under such theory what would be the rate on tea or silks, or high-priced horses, or delicate machines? Is there to be no classification of freight excepting upon the basis of cost of transportation plus insurance risk? If so the tariffs of every railroad in the United States must suffer a revolutionary change. In all classification consideration must be given to what may be termed public policy, the advantage to the community of having some kinds of freight carried at a less rate than other kinds. And this is the true meaning of the phrase ‘what the traffic will bear.’ It expresses the consideration that must be shown by the traffic man-

ager to the need of the people for certain commodities. He accordingly imposes a higher rate upon what may be termed luxuries as compared with that imposed upon those articles for which there is a more universal demand. He also gives consideration to the fact that the rate so imposed enters into the ultimate price to the consumer to but a small degree when the article is one of high value, and that those in the community who can afford to purchase such articles can well afford to pay a rate greater than that which could reasonably be imposed upon the general public for commodities of general use. In this sense what the traffic will bear and the value of service are analogous. No one would claim that a carrier was violating its duty under the law in charging three times the rate upon oriental rugs that it imposed upon cotton. This would not be undue discrimination as between commodities, even though it cost no more to transport the rugs than it did the cotton, assuming both to be carried at the owner's risk, for the one does not compete with the other, and one may reasonably bear a higher rate than the other on public grounds. It must be, therefore, that this Commission, under the amendment to section 1 passed by Congress in 1910, giving to us the control of freight classification, has power to determine the reasonableness of the differences that are made between the rates made applicable to the various kinds of commodities transported. We may not say that a rate shall be fixed so as to meet the requirements or needs of any body of shippers in their efforts to reach a given market, nor may we establish rates upon any articles so low that they will not return out-of-pocket cost. Neither could we fix an entire schedule of rates which would yield an inadequate return upon the fair value of the property used in the service given. There is, however, a zone within which we may properly exercise 'the flexible limit of judgment which belongs to the power to fix rates.' These are the words of the Chief Justice of the Supreme Court, 206 U. S. 26. There is no flexible limit of judgment if all rates must be upon a level of cost, and out of every dollar paid to the carrier must come a fixed amount of return for capital invested. The recognition of such a doctrine has never been suggested either by Congress or the Supreme Court. A just and reasonable rate must be one which respects alike the carriers' deserts and the character of the traffic. It cannot be a rate that takes from the carrier a profit and thus favors the shipper at the carrier's expense, nor is it one which compels the shipper to yield for the transportation given a sum disproportionate either to the service given by the carrier or to the service rendered to the shipper. The words 'just and reasonable' imply the application of good judgment and fairness, of common sense and a sense of justice to a given condition of facts. They are not fixed, unalterable, mathematical terms. Their meaning implies the exercise of judgment, and against the improper exercise of that judgment the Constitution gives protection, at least as far as the carriers are concerned.'

In the case of *Pittsburgh Steel Co. v. Lake Shore & M. S. Ry. Co.*<sup>2</sup> the Commission said: "This rate may, perhaps, be more properly viewed as one illustration of a common practice in railroad rate making of charging high rates where the traffic can easily be made to bear it. To a certain extent this must be done, for if a portion of the traffic of a road is carried at low rates because it will not move otherwise, so that it cannot bear its full proportionate share of the interest charges and common expenses, some other traffic must pay more than

its share of such interest charges and common expenses. Coke, coal and iron ore are sometimes spoken of as low-grade commodities, but it should be recognized that where they constitute a large proportion of the entire traffic and yield a correspondingly large proportion of the revenue, they should, so far as they are reasonably able to do so, pay their full proportionate share of the common expenses, as otherwise the relatively small tonnage of so-called high-grade traffic might be unduly burdened."

The Commission cannot accept the theory that rates may be increased by progressive advances as long as the traffic moves freely and until the highest point under which traffic will move freely is reached. Some traffic must move, and reasonably freely, up to the point where the rate becomes prohibitive.<sup>3</sup>

Although the Commission has never accepted the doctrine that the best test of the reasonableness of the rate is whether the traffic will move freely under it, it has always deemed the state of the industry a pertinent fact in considering the reasonableness of the rate.<sup>4</sup>

It is manifest that when additional revenues are desired and rates are to be increased for that purpose a horizontal advance in all rates on a fixed percentage, instead of yielding additional revenue, would not improbably result in reduced revenue. Competitive and commercial conditions have so important a relation to the movement of particular kinds of traffic as to make such a readjustment of a rate schedule inadvisable if not altogether impossible. To increase a rate on a given commodity when it is already as high as competitive or commercial conditions will allow, means that it will cease to move, and such a rate will necessarily result in a loss even of the revenue that has theretofore been enjoyed on that commodity.<sup>5</sup>

See "*Value of service versus cost of service*," Section 507-C, *ante*, and "*Cost of service versus value of service*," Section 608-C, *supra*.

1. In the Matter of the Investigation and Suspension of Advances in Rates for the Transportation of Coal by the Chesapeake & O. Ry. Co. et al., and their connections (1912), 22 I. C. C. Rep. 604, 623, et seq. Cited, Rate Increases in Western Classification Territory (1915), 33 I. C. C. Rep. 497, 606.
2. Pittsburgh Steel Co. v. Lake Shore & M. S. Ry. Co. (1913), 27 I. C. C. Rep. 173, 185, 186.
3. Commercial Club of Omaha v. Anderson & S. R. Ry. Co. (1910), 19 I. C. C. Rep. 419, 421; denied petition for rehearing of Commercial Club v. Anderson & S. R. Ry. Co. (1910), 18 I. C. C. Rep. 532, 536.
4. In Re Transportation of Wool, Hides and Pelts (1912), 23 I. C. C. Rep. 151, 156.
5. Railroad Commission of Texas v. Atchison, T. & S. F. Ry. Co. (1911), 20 I. C. C. Rep. 463, 482.

#### 608-E. VALUE OF COMMODITY.

The value of a commodity is one of the material considerations in the adjustment of rates, and it is just as unsound to say that rates upon carloads of equal tonnage and equal cost of movement, one of a low-grade, cheap commodity and the other of a high-grade and valuable commodity, should be made the same, except for the difference that might be allowed for the single item of increased risk, as it is to say that every commodity should be charged all it can stand or bear. It is alike in the public interest and just to the carriers, having regard to their entire business and their right to an opportunity to earn a fair return upon the property in addition to the cost of service, that

in the adjustment of rates due weight be given to differences in value of the respective commodities carried and that such differences be not limited by the mere measure of difference in risk. Otherwise one of two results would of necessity follow: The rates as a whole would be such that it would be impossible for the carriers to earn what they reasonably might and, in fact, what they of necessity should, in order to enable them to perform their services, or the rates on many low-grade commodities would have to be such that they would be prohibitory of any movement.<sup>1</sup>

There can never be a departure from the *ad valorem* principle in the making of rates. No governmental railway system does. The national highways may as properly tax a carload of tea with some relation to its value as the state may tax an import on the same basis or the toll road distinguish between the automobile and the wheelbarrow. In all charges of an arbitrary character where public policy is involved there is need that the greater burden shall fall upon those best able to support it. But classification of freight cares for value in the greater part.<sup>2</sup>

The element of value of the article transported forms a proper consideration to be taken into account in the establishment of a rate, since the greater the value the greater the carrier's liability as an insurer of the freight.<sup>3</sup>

While, however, value is the most important element to be considered in fixing rates, it plainly cannot be made an arbitrary standard independent of all other considerations.<sup>4</sup>

In determining what the relation should be between the rates charged for transporting two different freight articles, value is often an important factor, but this is not alone because of the greater risk connected with the transportation of the more valuable article. Improvements made during recent years in road-beds and equipment of carriers have rendered the item of risk in many cases of little consequence. The value of the article is important, principally, because of its bearing upon the value to the shipper of the transportation service, and the value of the service is, and has always been considered one of the most important elements to be considered when fixing the rates to be charged for transportation.<sup>5</sup>

In establishing uniform class or commodity rates the carrier can only be expected to take into account the estimated average value of shipments of the class or commodity to which the rates are applied.<sup>6</sup>

When a carrier has established a reasonable rate for the transportation of a given commodity it is not believed it can be required to change that rate to accord with the differing values of the same commodity produced by the different shippers—in other words to equalize natural business conditions. If this were so that might be made to fluctuate not only to meet the value of the commodity, but the executive or business ability of each individual producer.<sup>7</sup>

See "*Relation of articles transported*," Section 610-B, post.

On the question of rates graduated according to value, see "*Rates on damaged second-hand and used articles*, Section 608-Y, post, "*New and secondhand articles*," Section 507-O, ante; "*Value of article*,"

*Section 507-D, ante; "Limitation of Common Carrier's Liability—Initial Carrier's Liability," Chapter 20, post.*

1. **Union Tanning Co. v. Southern Ry. Co.** (1913), 26 I. C. C. Rep. 159, 163. The value of the commodity as an element to be considered in fixing the rate was considered in the following cases: **Darling & Co. v. Baltimore & O. Rd. Co.** (1909), 15 I. C. C. Rep. 79, 81; **Beekman Lumber Co. v. St. Louis I. M. & S. Ry. Co.** (1909), 15 I. C. C. Rep. 274, 275; **Mountain Ice Co. v. Delaware L. & W. Rd. Co.** (1909), 15 I. C. C. Rep. 305, 320; **James & Abbot Co. v. Boston & M. Rd. Co.** (1909), 17 I. C. C. Rep. 273, 274; **League of Southern Idaho Commercial Clubs v. Oregon S. L. Rd. Co.** (1910), 18 I. C. C. Rep. 562, 564; **National Refining Co. v. Cleveland C. C. & St. L. Ry. Co.** (1911), 20 I. C. C. Rep. 649, 650; **Maritime Exchange v. Pennsylvania Rd. Co.** (1911), 21 I. C. C. Rep. 81, 85; **Auto Vehicle Co. v. Chicago M. & St. P. Ry. Co.** (1911), 21 I. C. C. Rep. 286, 288; **Railroad Commissioners of Kansas v. Atchison T. & S. F. Ry. Co.** (1912), 22 I. C. C. Rep. 407, 410; **Coke Producers Assn. of the Connellsville Region v. Baltimore & O. Rd. Co.** (1913), 27 I. C. C. Rep. 125, 147.
2. **In Re Investigation of Advances in Rates by Carriers in Western Trunk Line, Trans-Missouri and Illinois Freight Committee Territories** (1911), 20 I. C. C. Rep. 307, 355.
3. **Howell v. New York L. E. & W. Rd. Co.** (1888), 2 I. C. C. Rep. 162, 2 I. C. C. Rep. 272.
4. **Grain Shippers' Assn. of Northwest Iowa v. Illinois C. Rd. Co.** (1889), 8 I. C. C. Rep. 158.
5. **Chicago Live Stock Exchange v. Chicago G. W. Ry. Co.** (1905), 10 I. C. C. Rep. 428. See also **Farrar v. Southern Ry. Co.** (1906), 11 I. C. C. Rep. 632; **Anthony v. Philadelphia & R. Ry. Co.** (1908), 14 I. C. C. Rep. 581; **Colorado Fuel & Iron Co. v. Southern P. Co.** (1895), 6 I. C. C. Rep. 488.
6. **Duncan v. Atchison T. & S. F. Ry. Co.** (1893), 6 I. C. C. Rep. 85, 4 I. C. Rep. 385.
7. **Hafley v. St. Louis & S. F. Rd. Co.** (1909), 15 I. C. C. Rep. 245.

608-F. RISK.

Risk is one of the elements entering into the present day rate fabric, and innumerable classifications and tariffs throughout the country contain packing and shipping requirements which can have no other justification than the right of the carrier to require the use of substantial and suitable containers and the elimination of hazard by the secure staying of unpacked articles. Carriers are obligated to furnish suitable cars and to receive and transport goods tendered to them in safe shipping condition, but are not obligated to prepare shipments for transportation. Standard box, stock, ventilated, and refrigerator cars in good repair will accommodate all of the ordinary and usual needs of shippers, and if more than this is demanded because of the form, nature, or peculiar characteristics of goods tendered for conveyance some obligation must attach to the shipper in connection with the additional demand.<sup>1</sup>

Ever since the inception of railroad transportation shippers have,<sup>2</sup> generally speaking, loaded and their consignees have unloaded carload freight. This practice or custom arose naturally because it was the easiest, most economical, and satisfactory way of doing the business. It is practically out of the question for railroads to provide men to load and unload carload freight at all points in the country. The shipper can load more satisfactorily and economically than anyone else. He is able to possess himself of effective appliances, where they can be used, and to employ skilled men to properly load all carload traffic, whether shipped in closed or on open cars. For the same reasons consignees are the best fitted to unload shipments. For more than fifty years the loading by consignor and unloading by consignee has been a recognized rule of carload transportation, and this rule extends to and includes commodities which yield to carriers the larger part of their revenue. With this custom and as properly a part of it, there has always existed another custom, which is that shippers

are required to secure loads for safe carriage. Because the shipper does the loading he is best situated to fasten the load upon the car. He has the facilities and men at hand and can do the work more satisfactorily and economically than anyone else.

To the extent that loss or damage is peculiar to a particular kind of traffic, that fact may be properly recognized in fixing the rate.<sup>3</sup> Most of the articles embraced under these classes are regarded by the carriers as time freight; that is, as freight that must be moved promptly in order to serve the public, as well as to avoid claims for damage in transit. Grain milled or unmilled, is liable to damage from heat or moisture; only meats and packing-house products move on fast schedules in refrigerator cars, the refrigeration being free, and the return haul frequently being empty. Most of the wheat and much of the corn is milled in transit without extra charge for the privilege, and the loss and damage claims in these classes, even under normal conditions, are higher than the average of such claims on all other commodities.<sup>4</sup>

Scrap iron moves in large quantities and is hauled almost exclusively in gondolas which have brought in the reversed direction shipments of machinery, structural material, and coal. The railroads move scrap iron at their convenience, it being considered low grade or dead freight. It requires no special or expedited service, and subjects the carrier to practically no risk of loss or damage.<sup>5</sup>

The character of pig iron is such, that while it is loaded mostly in box cars, their condition is a matter of no great concern, and cars that would be rejected for other traffic frequently are employed in this service. Loss and damage is an unknown quantity in the transportation of pig iron, the commodity being practically indestructible and with any kind of intelligent handling, not susceptible to loss even when transported by rail and water, with the usual transfer at the dock incident thereto.<sup>6</sup>

In the transportation of bar iron the risk involved is negligible.<sup>7</sup>

Regulations for the transportation of dynamite and black powder require examination of car before shipment, certification of absence of defects, placarding of car as containing explosives, and lay down certain restrictions in shifting, handling and placing the loaded car. These precautions add to the cost of transporting explosives but do not attach to smokeless powder or other inflammables. The cost of the maintenance of an efficient supervision over explosives and dangerous articles in transportation justifies a higher rate thereon than upon articles not so vigilantly guarded, and reasonably a proportionate amount of this extra cost should attach to the particular commodity involved.<sup>8</sup>

Newsprint paper is a desirable article for transportation in that it does not require any particular equipment or special speed in its movement; the amount of claims for loss and damage is negligible, and the daily movements from the mills is regular and uniform.<sup>9</sup>

Grain is generally shipped in bulk and the mill products are generally shipped in packages. It is a matter of common knowledge that claims for loss of grain in transit are numerous and aggregate large sums. It is not at all certain that heavier car loading of grain than

of grain products compensates the carriers for this loss. In any event as the tariffs show, it is a very general practice to apply substantially the same rates to grain and the products thereof. In some instances the grain rates are slightly higher than the products rates, and in other instances the converse is true, but the statement that the rates on grain and grain products are substantially the same is generally and approximately correct.<sup>10</sup>

In the transportation of flour a somewhat better grade of equipment is required for its transportation and a greater degree of expedition is required than on shipments of wheat. The loss and damage claims on flour are somewhat greater than on wheat; the value of a carload of flour being greater than that of a carload of wheat.<sup>11</sup>

Flaxseed rates, both local and proportional, are at least as high as the wheat rates, and in view of the relative value, relative risk, and relative volume of traffic of flaxseed as compared with coarse grain and wheat, flaxseed rates may properly be as high as those on wheat.<sup>12</sup>

Smoking tobacco and plug tobacco are of about the same relative value, but the former is more liable to damage principally because it is contained in glass jars, or cloth or paper bags, packed in ordinary wooden or fibreboard cases, while the latter is pressed into substantial wooden boxes.<sup>13</sup>

In the shipment of both type and electrototype plates the liability for loss and damage is negligible.<sup>14</sup>

While carriers may adjust their rates with a view to the hazards incident to the transportation of certain classes of traffic it is not proper that they should advance those rates on account of damages which have accrued from their own neglect and which would not have accrued had the traffic been handled in a reasonably diligent and prudent manner.<sup>15</sup> The United States Supreme Court has held that the risk of injury, and the large amount which the railway companies are called upon to pay out in damages for losses, may excuse a higher freight rate on live stock than on dressed meats and packing-house products.<sup>16</sup>

There can be no question that more claims relatively arise from transportation of less-than-carload business than from carload freight.<sup>17</sup> Manufacturers and dealers frequently ship automobiles in carloads by double-decking the cars, but it is not feasible for carriers to do this or to make use of the space above one or more automobiles in a single car. Carload shipments are sealed and transported intact to destination, and this method results in the minimum risk of pilferage or damage as computed with the risk to which less-than-carload shipments are exposed. There are perhaps but few articles of freight more subject to injury and unsatisfactory to handle than automobiles uncrated. When shipped in less than carloads they must be handled with the greatest care to prevent injury from other freight. It is likewise true that a comparatively small injury to an average automobile will generally result in damages equal to or in excess of the revenue received for its transportation.<sup>18</sup>

See "*Risk*," Section 507-K, ante.

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1. Dunnage Allowances (1914). 30 I. C. C. Rep. 538, 542.

2. National Wholesale Lumber Dealers Assn. v. Atlantic C. L. Rd. Co. (1908), 14 I. C. C. Rep. 154, 160.

3. New Orleans Live Stock Exchange v. Texas & P. Ry. Co. (1904), 10 I. C. C. Rep. 327.
4. Morgan Grain Co. v. Atlantic C. L. Rd. Co. (1910), 19 I. C. C. Rep. 460, 469.
5. Scrap-Iron Rates Between Duluth, Minnesota and Chicago, Ill. and Other Points (1913), 28 I. C. C. Rep. 467, 468.
6. Sloss-Sheffield Steel & Iron Co. v. Louisville & N. Rd. Co. (1914), 30 I. C. C. Rep. 597, 602.
7. Norris v. St. Louis & S. F. Rd. Co. (1912), 25 I. C. C. Rep. 416, 423.
8. United States v. Wharton & N. Rd. Co. (1913), 26 I. C. C. Rep. 309, 311.
9. Lake Superior Paper Co. Ltd. v. Duluth S. S. & O. Ry. Co. (1914), 30 I. C. C. Rep. 403, 408.
10. Superior Commercial Club of Superior, Wisc. v. Great N. Ry. Co. (1912), 24 I. C. C. Rep. 96, 118.
11. Kansas-California Flour Rates (1915), 32 I. C. C. Rep. 602, 604.
12. In the Matter of the Investigation and Suspension of Advances in Rates by Carriers for the Transportation of Flaxseed from Minneapolis, Minn., and other points to Chicago, Ill., and other destinations. (1912), 25 I. C. C. Rep. 337, 340.
13. Bagley & Co. v. Pere Marquette Rd. Co. (1913), 25 I. C. C. Rep. 698, 699.
14. Bancroft-Whitney Co. v. Cincinnati N. O. & T. P. Ry. Co. (1912), 24 I. C. C. Rep. 557, 558.
15. Cattle Raisers' Assn. v. Missouri K. & T. Ry. Co. (1905), 11 I. C. C. Rep. 296; New Orleans Live Stock Exchange v. Texas & P. Ry. Co. (1904), 10 I. C. C. 327.
16. Interstate Commerce Commission v. Chicago G. W. Ry. Co. (1908), 209 U. S. 108, 52 L. Ed. 705, 28 Sup. Ct. Rep. 493; affirming, Interstate Commerce Commission v. Chicago G. W. Ry. Co. (1905), 141 Fed. Rep. 1003. The history of this case is as follows: Chicago Live Stock Exchange v. Chicago G. W. Ry. Co. (1905), 10 I. C. C. Rep. 428. From the Missouri River to Chicago, Ill., carriers ordered to discontinue charging higher rates on live stock than on packing-house products on the ground that the lower rates on the products constitute an undue preference in favor of the products in violation of Section 3 of the Act. Interstate Commerce Commission v. Chicago G. W. Ry. Co. supra, Commission's order held invalid on the ground that there is no violation of Section 3 of the Act on account of railroad competition and *other transportation dissimilarities*. Interstate Commerce Commission v. Chicago G. W. Ry. Co., supra, Commission's order held invalid and judgments of lower court affirmed.
17. Commercial Club of Omaha v. Baltimore & O. Rd. Co. (1910), 19 I. C. C. Rep. 397, 400.
18. Keats Auto Co. v. Oregon-Washington Rd. & Nav. Co. (1913), 28 I. C. C. Rep. 412, 413.

#### 608-G. VOLUME OF TRAFFIC.

A trainload of coal can be transported more cheaply in proportion to quantity than a single carload, and a carload more cheaply than 100 pounds. So if the business is large, though it be transportation of many kinds of property, it can be done relatively more cheaply than if it were small.<sup>1</sup>

However, whatever difference there may be in the cost to the carrier between traffic in trainloads and traffic in carloads, it appears from the general course of legislation with respect to commerce between the states, from the debates and reports of the various committees in Congress when the Act to Regulate Commerce was under consideration, from the better considered court opinions and from the reports and opinions of the Interstate Commerce Commission that to give greater consideration to train-load traffic than to car-load traffic would create preference in favor of large shippers and be to the prejudice of small shippers and the public.<sup>2</sup>

An immense volume of traffic is an argument for not only reasonable but comparatively low rates.<sup>3</sup> Therefore, the greater the tonnage of an article transported the lower should be the rate.<sup>4</sup>

It is well understood that freight rates should decline as a country develops and as business therefor increases. Rates are and have been lower in very densely populated portions of our country than in those parts where the population is less dense; and this is because with the increase in traffic comes increased profit from the handling of that

traffic.<sup>5</sup> The greater volume of traffic and greater number of carriers operating in a territory create a greater degree of competition, and the rates generally have been adjusted with a view to meet the conditions resulting therefrom.<sup>6</sup> Volume of traffic may excuse a lower rate partly because freight can be handled more cheaper in large quantities than in small, and partly because a railroad is justified in making a lower rate to induce a large volume of traffic where the circumstances are such that the rate will have this effect.<sup>7</sup>

While volume of movement is not the only consideration in the establishment of commodity rates, it is an important element which, other considerations being equal, may and not infrequently does become determinative.<sup>8</sup>

See "*Volume of traffic*," Section 507-F, *Ante*.

1. First Annual Report of the Interstate Commerce Commission (1887, p. 39).
2. Anaconda Copper Mining Co. v. Chicago & E. Rd. Co. (1910), 19 I. C. C. Rep. 592, 596; Carstens Packing Co. v. Oregon S. L. Rd. Co. (1909), 17 I. C. C. Rep. 324, 328.
3. Farrar v. Southern Ry. Co. (1906), 11 I. C. C. Rep. 632.
4. Tift v. Southern Ry. Co. (1905), 10 I. C. C. Rep. 548. Commission's order held to be valid. Carriers restrained from enforcing the advance; and reparation awarded in accordance with stipulation. Tift v. Southern Ry. Co. (1905), 138 Fed. Rep. 753. Commission's order held to be valid. Carriers restrained from enforcing the advance; and reparation awarded in accordance with stipulation. Southern Ry. Co. v. Tift (1906), 148 Fed. Rep. 1021. Commission's order held to be valid. Carriers restrained from enforcing the advance; and reparation awarded in accordance with stipulation. Southern Ry. Co. v. Tift (1907), 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. Rep. 709. See also, Central Yellow Pine Assn. v. Illinois C. Rd. Co. (1905), 10 I. C. C. Rep. 505; New York Hay Exchange Association v. Pennsylvania Rd. Co. (1908), 14 I. C. C. Rep. 178, 181; Moise Bros. Co. v. Chicago R. I. & P. Ry. Co. (1909), 16 I. C. C. Rep. 550, 555; Virginia-Carolina Chemical Co. v. St. Louis I. M. & S. Ry. Co. (1910), 18 I. C. C. Rep. 1. National Hay Assn. v. Michigan C. Rd. Co. (1910), 19 I. C. C. Rep. 34, 47; Commercial Club v. Atchison T. & S. F. Ry. Co. (1910), 19 I. C. C. Rep. 218, 223; Hydraulic-Press Brick Co. v. Mobile & O. Rd. Co. (1910), 19 I. C. C. Rep. 530; Merchants & Manufacturers' Assn. of Baltimore, Md. v. Atlantic C. L. Rd. Co. (1912), 23 I. C. C. Rep. 129; Richards v. Atlantic C. L. Rd. Co. (1912), 23 I. C. C. Rep. 239, 240; In the Matter of the Investigations and Suspension of Advances in Rates by Carriers for the Transportation of Flaxseed in Carloads from Fort William, Port Arthur and Westport, Ontario, to New York, N. Y., Philadelphia, Pa., and Other Points, (1912), 23 I. C. C. Rep. 272, 275; In the Matter of the Investigation and Suspension of Advances in Rates by Carriers for the Transportation of Live Stock from Points in the State of New Mexico to Kansas City, Mo., and between other points, (1912), 25 I. C. C. Rep. 63, 64; Wharton Steel Co. v. Delaware L. & W. Rd. Co. (1912), 25 I. C. C. Rep. 303, 308; Union Tanning Co. v. Southern Ry. Co. (1913), 26 I. C. C. Rep. 159, 164; Tone Bros. v. Illinois C. Rd. Co. (1913), 26 I. C. C. Rep. 279, 281; Wisconsin Steel Co. v. Pittsburgh & L. E. Rd. Co. (1913), 27 I. C. C. Rep. 152, 164; Pittsburgh Steel Co. v. Lake Shore & M. S. Ry. Co. (1913), 27 I. C. C. Rep. 173, 179; Commercial Club of Omaha v. Anderson & S. S. Ry. Co. (1913), 27 I. C. C. Rep. 302, 317.
5. In Re Class and Commodity Rates from St. Louis to Texas Common Points (1905), 11 I. C. C. Rep. 238.
6. Railroad Commission of Kentucky v. Louisville & N. Rd. Co. (1908), 13 I. C. C. Rep. 300, 308.
7. Burgess v. Transcontinental Freight Bureau (1908), 13 I. C. C. Rep. 668, 675.
8. DuPont de Nemours & Co. v. Director General, as Agent, Philadelphia, B. & W. Rd. Co. (1920), 58 I. C. C. Rep. 427, 428.

#### 608-H. WEIGHT AND BULK OF ARTICLE.

The weight and bulk of the goods transported and the convenience of transportation are proper elements to be considered in fixing a rate.<sup>1</sup> For example, furniture is light and bulky freight as compared with most other kinds of freight.<sup>2</sup>

See "*Weight and bulk of commodity*," Section 507-J.

1. Interstate Commerce Commission v. Chicago G. W. Ry. Co. (1905), 141 Fed. Rep. 1003; affirmed, Interstate Commerce Commission v. Chicago G. W. Ry. Co. (1908),

- 209 U. S. 108, 28 Sup. Ct. Rep. 493, 52, L. Ed. 705; Grain Shippers' Assn. of Northwest Iowa v. Illinois C. Rd. Co. 8 I. C. C. Rep. 158.  
2. Montague & Co. v. Atchison T. & S. F. Ry. Co. (1909), 17 I. C. C. Rep. 72, 74.

#### 608-I. LOCOMOTIVE ON OWN WHEELS UNDER POWER.

The conditions presented in the transportation of a live locomotive are materially different from those attendant upon the transportation of a dead locomotive, for the reason that, as the carrier furnishes only trackage and no motive power, weight is almost an immaterial factor. It is true that such a movement is similar to the movement of an entire train so far as the train dispatching is concerned, but it would seem that a flat rate per mile properly might be charged in such cases.<sup>1</sup>

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1. In the Matter of the Investigation and Suspension of Advances in Rates by Carriers for the Transportation of Locomotives and Tenders named in a Schedule filed with the Interstate Commerce Commission (1911), 21 I. C. C. Rep. 103, 111.

#### 608-J. DISTANCE.

As early as 1872 it had been fully demonstrated in England that equal mileage as a basis for settling the difficulty was entirely impracticable. In that year the committee upon the amalgamation of railways reported upon this subject, and the substance of this report is found in the note to the case of *Ransome v. Railway Co.*, 1 Nev. & McN. 63, which was one of the Coal Traffic Cases. In reporting against equal mileage, the committee said:<sup>1</sup>

"(a) It would prevent railway companies from lowering their fares and rates so as to compete with traffic by sea, by canal, or by shorter or otherwise cheaper railway, and would thus deprive the public of the benefit of competition and the company of a legitimate source of profit.

"(b) It would prevent railway companies from making perfectly fair arrangements for carrying at a lower rate than usual goods brought in large and constant quantities, or for carrying for long distances at a lower rate than for short distances.

"(c) It would compel a company to carry for the same rate over a line which has been very expensive in construction, or which, from gradients or otherwise, is very expensive in working, at the same rate at which it carries over less expensive lines. In short, to impose equal mileage on the companies would be to deprive the public of the benefit of much of the competition which now exists or has existed, to raise the charges on the public in many cases where the companies now find it to their interest to lower them, and to perpetuate monopolies in carriage, trade, and manufacture in favor of those routes and places which are nearest and least expensive, where the varying charges of the company now create competition. And it will be found that the supporters of equal mileage, when pressed, often really mean, not that the rates they themselves pay are too high, but that the rates which others pay are too low."

It was the intention of the Act to Regulate Commerce to establish equal mileage rates that are not compulsory nor always politic; one effect of such rates would be to put an end to competition as a factor in making rates, and it would work a revolution in the business of the country, which though it might be beneficial in some instances would be destructive in others.<sup>2</sup>

Distance is an important and ever present element in the problem of rates and in the *absence of other influences* it is a controlling factor.<sup>3</sup> However mileage and the consequent cost of service regardless of other conditions cannot be made the controlling factor in determining the lawfulness of rates. An inflexible rule to the contrary would be disastrous to the transportation business of the country and would be more injurious to the public than to the railroads.<sup>4</sup>

In dealing with the question of rates, distance is important only as it affords a measure of transportation.<sup>5</sup>

To permit distance to be the sole or controlling factor would be to introduce discrimination which would create chaotic conditions under which irreparable injuries would be done to individuals, firms, and communities without any compensating good resulting to the people or the commerce of the country as a whole.<sup>6</sup>

It is because of the widely varying conditions of the country that the statute allows the railroads to adjust their charges to forces that are compulsory in character.<sup>7</sup>

The Commission has said: "While we are not to be understood as intimating that substantial difference in distance are not to be given consideration, we are not willing to accept the theory of rate construction based purely on distances. Such adjustment would be revolutionary and destructive to established commercial interests of enormous volume in value."<sup>8</sup>

While it must be conceded that there is an apparent justice in the claim that rate should be apportioned to distance, it is not an absolute and unconditional *right* from which a departure may not be justified by other considerations. The public benefits, the greater volume of business of carriers warranting lower rates to all, and the forces of competition by other lines, may furnish reasons that outweigh a claim of right founded only on geographical location.<sup>9</sup>

A rule of equal mileage rates over different railroads would often prevent legitimate competition and frequently give a monopoly to the best and shortest roads.<sup>10</sup>

A departure from equal mileage rates on different branches or divisions of a road is not conclusive that such rates are unlawful but the burden of proof is on the company making such departure to show its rates to be reasonable when disputed.<sup>11</sup>

Where all distances brought into comparison are considerable, and the difference between them is relatively small, there should be substantial similarity in the respective rates unless other modifying circumstances justify disparity.<sup>12</sup>

In *Union Tanning Company v. Southern Ry. Company*,<sup>13</sup> the Commission said: "While in fixing reasonable rates and relative rate adjustments distance must always be considered as bearing both upon cost to the carrier in performing the service and the value of the service to the shipper, there are many other facts, such as density or scarcity of traffic over and along the lines of movement, comparative cost of construction and operation, and competitive conditions, which must be given weight. In some situations the other facts and conditions are so nearly uniform or similar that distance becomes the dominating factor in the relative adjustment of rates, while in others distance becomes, within limitations, a minor factor because of the dominating and controlling force of other facts and conditions; hence many striking inconsistencies would be apparent in different rate adjustments made by orders of this and State commissions, as well as voluntarily by the carriers, if examined and compared with regard to distance alone. If the Commission would dispose of these rates questions and contro-

versities by resort alone or mainly to comparative distances, ton-mile earnings, and estimated relative earnings above the estimated so-called 'out-of-pocket' cost to the carrier for each service performed, there could always be found standards for the reduction of every rate to the basis of the lowest, whatever may have compelled or induced its establishment. For the Commission to adopt such a course would inevitably lead to a continuous process of reducing the carriers' revenue, a result which would be detrimental to the public interest as well as unjust to the carriers.

"Justice and reasonableness, demanded by the law and due alike to shippers and carriers and without which the public interest will not best be served, can only be secured by a careful consideration of all the facts, circumstances, and conditions which legitimately and practically bear upon the question before us. No inflexible, theoretical rule fixing the measure of weight to be given a comparison of distance and other facts, which vary in degree of importance in different cases, can conduce to the determination of the lawfulness of rates, which must be determined by their reasonableness, and the latter is ascertainable only as a question of fact by duly weighing all of the facts standing together in each case."

In the case of *Fort Dodge Commercial Club v. Illinois C. Rd. Co.*<sup>14</sup> the Commission said: "Unquestionably mileage is a factor in the determination of the reasonableness of rates, but how important, or what effect it should have in judging the fairness of a challenged rate is a question which must be answered in the light of all the facts surrounding the exaction of the rate. Early after its organization the Commission held that it was not the purpose of the act to compel the establishment of rates solely according to mileage, and that the public benefits, the greater volume of business to carriers warranting lower rates to all the forces of competition, and many other potent considerations might far outweigh a claim of right founded only on geographic location. *Imperial Coal Co. v. P. & L. E. R. R. Co.*, 2 I. C. C. Rep. 618.

"The following excerpts are also applicable here:

"The words "reasonable" and "just" as applied to rates, do not mean that the rates upon every railroad shall be the same or even about the same. The circumstances and conditions of each road, which enter into and control the nature and character of the service performed, such as the cost of service, which involves volume or lightness of traffic, expense of construction and of operation, competition of carriers not subject to the act, rates made by shorter and competing lines to the same points of destination, space occupied by freight, value of freight and risk of carriage to the carrier, must all be considered in determining whether a given rate is "reasonable" and "just." Tested by these rules, a rate may be reasonable and just on one railroad and not reasonable and just on another. *New Orleans Cotton Exchange v. I. C. R. R. Co. et al.*, 3 I. C. C. Rep. 534.

"While the revenue per ton per mile over other routes on other lines and to other destinations is often suggestive in arriving at a proper estimate of the reasonableness of a rate over a route complained of, it is by no means conclusive. Varying conditions existing on different lines must of necessity justify differences in rates for hauls of the same distance. The real question in any such complaint is the reasonableness of the particular rate on the particular line between the particular points in question. In testing such a rate the rates on the same or adjacent lines in the immediate territory where the same conditions exist are of much greater significance than rates over lines in other sections of the country. *Dallas Freight Bureau v. G. C. & S. P. Ry. Co. et al.*, 12 I. C. C. Rep. 223."

"As previously indicated, the rate per ton per mile on coal for the haul of 375 miles from Chicago to Fort Dodge is slightly less than 5 mills; certainly not a high rate. *Johnston v. St. L. & S. F. R. R. Co.*, 12 I. C. C. Rep. 73. *Lincoln Commercial Club v. C., R. I. & P. Ry. Co.*,

13 I. C. C. Rep. 319. *Okla. & Ark. Coal Traffic Bureau v. C., R. I. & P. Ry. Co.*, 15 I. C. C. Rep. 216.

"Coal is a low-grade freight, moving in vast quantities; it is a natural product and the commercial conditions surrounding its production, the competitive conditions under which it moves, and its varying cost in different fields, make the rates on it such as should be given more careful scrutiny, perhaps, than the rates on many other commodities."

In *Page Mullins Co. v. Norfolk & W. Ry. Co.*<sup>15</sup> the Commission said: "In any situation affecting groups of points subject to the same general basis or scale of rates, we may properly, and will, inquire into the conditions presented at one or more of the specific points whether typical or otherwise, but we must at the same time look to the entire rate structure and where, as in this case, a distance scale applies, both the *extreme* and the *mean* distance rates must be considered."

1. Interstate Commerce Commission v. Louisville & N. Rd. Co. (1896), 72 Fed. Rep. 409, 424.
2. First Annual Report of the Interstate Commerce Commission (1887, p. 40); *La-Crosse Manufacturers' & Jobbers' Union v. Chicago M. & St. P. Ry. Co.* (1887), 1 I. C. C. Rep. 629, 2 I. C. Rep. 9; *Imperial Coal Co. v. Pittsburgh & L. E. Rd. Co.* (1889), 2 I. C. C. Rep. 618, 2 I. C. Rep. 436.
3. *Freight Bureau of Cincinnati v. Cincinnati N. O. & T. P. Ry. Co.* (1897), 7 I. C. C. Rep. 180; citing, *Eau Claire Board of Trade v. Chicago, M. & St. P. Ry. Co.* (1892), 4 I. C. Rep. 65, 5 I. C. C. Rep. 265; *Hill v. Nashville C. & St. L. Rd. Co.* (1895), 6 I. C. C. Rep. 343; *Freight Bureau of Cincinnati v. Cincinnati N. O. & T. P. Ry. Co.* (1894), 6 I. C. C. Rep. 195, 4 I. C. Rep. 192; *New York Produce Exchange v. Baltimore & O. Rd. Co.* (1898), 7 I. C. C. Rep. 612; *McMorran v. Grand Trunk Rd. Co.* (1889), 2 I. C. Rep. 604, 3 I. C. C. Rep. 252.
4. *Lehman, Higginson & Co. v. Southern P. Co.* (1890), 3 I. C. Rep. 80, 4, I. C. C. Rep. 1.
5. In the Matter of Differential Freight Rates to and from North Atlantic Ports (1905), 11 I. C. C. Rep. 13.
6. *Wilhoit v. Missouri K. & T. Ry. Co.* (1907), 12 I. C. C. Rep. 139.
7. *Lehman, Higginson & Co. v. Southern P. Co.*, *supra*.
8. *Kansas City Transportation Bureau v. Atchison T. & S. F. Ry. Co.* (1909), 16 I. C. C. Rep. 195; cited in *Inland Empire Shippers League v. Director General, Oregon-Washington Rd. & Nav. Co.* (1920), 59 I. C. C. Rep. 321, 340.
9. *Imperial Coal Co. v. Pittsburgh & L. E. Rd. Co.* (1889), 2 I. C. C. Rep. 618, 2 I. C. Rep. 436; *Corporation Commission of the State of North Carolina v. Norfolk & W. Ry. Co.* (1910), 19 I. C. C. Rep. 303, 309; *Omaha Grain Exchange v. Chicago & N. W. Ry. Co.* (1910), 19 I. C. C. Rep. 424, 431; *Indianapolis Freight Bureau v. Cleveland C. C. & St. L. Ry. Co.* (1912), 23 I. C. C. Rep. 195, 205.
10. *Now Orleans Cotton Exchange v. Cincinnati N. O. & T. P. Ry. Co.* (1888), 2 I. C. C. Rep. 375, 2 I. C. Rep. 289; *Now Orleans Cotton Exchange v. Illinois C. Rd. Co.* (1890), 3 I. C. C. Rep. 534, 2 I. C. Rep. 777.
11. *James & Abbott v. Canadian P. Ry. Co.* (1893), 5 I. C. C. Rep. 612, 628, 4 I. C. Rep. 274; *Logan v. Chicago & N. W. Ry. Co.* (1889), 2 I. C. C. Rep. 604, 612, 2 I. C. Rep. 431.
12. *Eau Claire Board of Trade v. Chicago M. & St. P. Ry. Co.* (1892), 4 I. C. Rep. 65, 5 I. C. C. Rep. 265.
13. *Union Tanning Co. v. Southern Ry. Co.* (1913), 26 I. C. C. Rep. 159, 164.
14. *Fort Dodge Commercial Club v. Illinois C. Rd.* (1909), 16 I. C. C. Rep. 572, 581.
15. *Page Milling Co. v. Norfolk & W. Ry. Co.* (1914), 30 I. C. C. Rep. 605, 608.

#### 608-K. COMPETITION.

See "*Fourth Section of the Interstate Commerce Act—Long-and-Short-Haul Clause—Fourth-Section Applications,*" Chapter 7, post.

#### 608-L. RELATIONS OF THE CARRIERS AND THE PUBLIC.

In the proceeding entitled "*Rate Increases in Official Classification Territory,*"<sup>1</sup> the Interstate Commerce Commission made the following interesting survey: "The relations of the shipping public and the car-

riers were earnestly discussed by counsel and should be briefly considered before we take up the main questions presented on the record. As long ago as the seventeenth century Lord Chief Justice Hale announced the principle that when one devotes his property, as for example, a ferry, to the common use of all the king's subjects passing that way and upon a common charge for the service, it becomes a thing of public interest and therefore ought to be subject to public regulation. *De Jure Maris*, 1 Harg, Law Tracts 6. This rule of the common law underlies practically all our constitutional and legislative provisions respecting common carriers; and it is now firmly settled, both by the courts and through legislation, that railroads, although constructed with private capital, are public highways subject to public control. In constructing and maintaining such a highway under public sanction the railroad company really performs a function of the state. *Olcott v. Supervisors*, 16 Wall. 678, 694; *L. & N. R. R. Co. v. Kentucky*, 161 U. S. 677, 696; *L. S. & M. S. Ry. Co. v. Ohio*, 173 U. S. 285, 302.

"Unlike most other countries, we have committed the performance of this public function to companies of private ownership. Practically the entire railroad mileage of the country, aggregating more than one-third the mileage of the world, has been constructed with private capital. But the national government in many instances has donated the rights of way for railroads and in addition has made them other large grants of land. States, counties and municipalities have made similar grants and have otherwise aided railway companies by contributions of funds, by issuing bonds, or by guaranteeing the bonds of such companies. The public, through governmental agencies, has therefore played no small part in the development of our railroad system. Nevertheless the great burden of creating these avenues of communication and transportation has been borne by private investors; and not infrequently they have ventured their capital in such enterprises by extending through undeveloped territories lines that at the time offered little prospect of substantial returns for many years to come.

"The general duties that common carriers owe to the public are well understood. They must provide a prompt and safe service and they are held to a strict responsibility for injuries to travelers using their facilities and for loss of or damage to property which they undertake to carry. They are also under the obligations not to charge an excessive rate for the service; this was the rule at common law and it has been emphasized by specific legislation. On the other hand, we cannot doubt that the policy of inviting and authorizing the performance of this public function by privately owned companies involves obligations on the part of the public to the owners of these properties. Those who invest their funds in railroad shares are, of course, charged with the responsibility of securing for their properties honest and capable management. Investors in railroad securities, like investors in other securities, must bear the consequence of dishonesty or inefficiency on the part of those selected to manage the properties. No one could reasonably contend that the public should pay higher transportation rates because once prosperous properties—like the New Haven, the Chicago & Eastern Illinois, the Alton, the Frisco, or the Cincinnati, Hamilton & Dayton—may now be in need of additional funds as a consequence of mismanagement. Investors in railroad securities must also take the risk of those errors of judgment which not infrequently attend even the careful management of enterprises conducted for profit. But they

should likewise be permitted to enjoy fully the profits which naturally flow, under a reasonable scale of rates, from the exercise of good judgment, integrity, and efficiency in the management of such properties. While the right to demand a higher rate may be denied when the existing charge is reasonable, even though the particular carrier may be in need of additional earnings, so a carrier may be entitled to a higher rate for a particular service because the existing rate is unreasonably low, although the carrier may not be in need of additional revenues. This principle has found expression in the reports of this Commission. In *Railroad Commissioners of Iowa v. I. C. R. R. Co.*, we said:

"But the fact that the net revenues of the Illinois Central from its ownership of the bridge \* \* \* may be greater than the returns on ordinary business enterprises is not sufficient in itself to justify a holding that the bridge tolls are excessive \* \* \*. A railroad company may be operated with a less return than it ought to enjoy, or even at a loss, but neither condition of affairs would justify the exaction by it of rates that are higher than they reasonably should be for the services performed, all things being considered. So also the fact that the net earnings of a carrier may be large does not of itself justify us in fixing a rate at less than is reasonable for the service, all other things being considered."

"In that case we denied the prayer of the complainant for a reduction in rates, notwithstanding the very generous returns to the carrier on its investment.

"Many railroad investments in this country are exceedingly profitable to their owners. In common justice the investors in such properties are entitled to share in the general prosperity and to enjoy the just rewards of their foresight and wisdom so long as the rates exacted are reasonable. It is not only consistent with a national policy that invites the private ownership of railroads that there should be a liberal return on a particular railroad investment, when the property has been wisely planned and honestly constructed and is efficiently managed; but the full development of that policy, as well as justice, requires that such a return should be made. The public interest demands not only the adequate maintenance of existing railroads, but a constant increase of our transportation facilities to keep pace with the growth and requirements of our commerce. If, however, that development is to be accomplished with private capital, in conformity with our traditions, nothing can be more certain than that the facilities will not be provided except under such a system of regulation as will reasonably permit a fair return on the money invested.

"The public owes to the private owners of these properties, when well located and managed, the full opportunity to earn a fair return on the investment; and the carriers owe to the public an efficient service at reasonable rates. This fundamental doctrine has been recognized by the Commission in the performance of its duties. The proceeding before us may therefore be described as, in some sense, a controversy between the consuming public which pays the rates, and the investor who furnishes the facilities for moving the freight; and our duty is to ascertain from the record before us what are their respective rights. That, in fact, is the real railroad question—the just balancing of the mutual rights of the public and of the carriers under a national policy that permits and invites the performance of this public function by private interests. From that point of view the problems and difficulties of our railroads become public problems of great national concern."

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1. Rate Increases in Official Classification Territory (The Five Per Cent Case) (1914),  
31 I. C. C. Rep. 351, 357, et seq.

## 608-M. COST OF PRODUCTION TO THE MANUFACTURER.

A company may not with propriety seek the establishment of lower rates on its articles of manufacture because it is not in a prosperous condition or because the cost of assembling its raw material may be greater than that of its competitor.<sup>1</sup>

Excess of manufacturing cost to a producer at one point over that of its competitors in other localities, by reason of inferior raw material and fuel, condition of its plant, cost of labor, or other like causes, is not to be considered in ascertaining rightful relative adjustment of rates from such places.<sup>2</sup>

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1. *Pardee Works v. Central Rd. Co. of New Jersey* (1914), 29 I. C. C. Rep. 500, 502.
  2. *Colorado Fuel & Iron Co. v. Southern P. Co.* (1895), 6 I. C. C. Rep. 488.

## 608-N. INVESTMENT IN A COMMERCIAL ENTERPRISE RELYING UPON A CERTAIN RATE ADJUSTMENT.

The fact that a manufacturer has built a plant at a certain point relying upon assurances from representatives of the carriers that a lower rate will be established from points of origin of the required raw material, will not in and of itself afford sufficient ground for finding the existing rate to be unreasonable. Nor would it be material to the inquiry if it were established that such an agreement had been entered into between the parties.<sup>1</sup>

Nor would it be material if an agreement had been made between the shipper and the carrier that there should be established and maintained certain rates, since it is fundamental that the carriers' duty is to charge a reasonable rate for the service performed, and by that we mean not only must it not charge a rate that is unreasonably high but also that it would be unlawful to charge a rate so low as to be noncompensatory or impose a burden upon other traffic.<sup>2</sup> The reasonableness of a rate must be determined irrespective of contractual obligations of a particular shipper.<sup>3</sup>

However, the Commission has frequently held that where a plant has been established and money has been invested on the faith of certain transportation rates and conditions upon which the life of the plant depends the carrier may not increase those rates and charges to the serious disadvantage of such investment *without good cause or reason*.<sup>4</sup>

In the case of *Oregon & Washington Lumber Manufacturers Ass'n v. Southern P. Co.*<sup>5</sup> the Interstate Commerce Commission said: "This Commission has never understood that it would dictate the policy of a carrier in the making of its rates, in so far as there was just room for the exercise of a policy. It has several times explicitly so declared. We have, however, believed that we might consider what the policy of a carrier had been in determining whether the rates resulting from a change in that policy were just and reasonable. It often happens that the very existence of an industry depends upon the rate accorded to it. If, now, a carrier has established a particular rate for the express purpose of enabling an industry to exist, and if, upon the strength of that rate, money has been invested which must be destroyed if the rate is withdrawn, it has been our understanding that this fact might properly be considered in passing upon the reasonableness of the proposed change in the rate. Such fact is not controlling, but is one of the circumstances

which may properly be kept in view. It has been our opinion that we might, in a proper case, order the continued maintenance of a rate upon which the investment of money had been induced, even though we would not in the first instance, as an original proposition, have directed the establishment of that rate.

"The policy of a railroad cannot be dictated entirely by its own interest. It cannot arbitrarily change that policy from day to day when those changes result in undue hardship to its patrons. The welfare of the public, as well as its own welfare, must be considered. To that extent this Commission has believed that it might control the policy of carriers, and to that extent alone. It is still of the opinion that this must be so unless the property rights of shippers are to rest in the arbitrary whim of the carrier without the right of appeal to any tribunal."

But an unlawful rate does not become lawful simply because to declare that they are lawful will work destruction to property interests which have developed under the maintenance of the unlawful rate; nor should carriers or this Commission refrain from a change in rates simply because it destroys property interests. It often happens, and perhaps usually happens, that a departure from present methods which is clearly for the public good involves an immediate loss, due to the throwing away of what the change makes worthless.<sup>6</sup>

The fact that the investments have been made in the expectation that existing rates would be continued in effect cannot be considered in determining the reasonableness of proposed increased rates.<sup>7</sup>

In *Chattanooga Log Rates*,<sup>8</sup> the Commission said: "However reluctant the Commission may feel to sanction changes in rates which tend to impair or destroy the value of investments made in expectation of their continuance, it cannot on that ground deny to carriers the right to change rates which are just and reasonable.

1. Meridian Fertilizer Factory v. Louisville & N. Rd. Co. (1914), 30 I. C. C. Rep. 494.
2. Lumber Rates from Points in Arkansas, Louisiana, Missouri, Oklahoma, and Texas, and also from Memphis, Tenn., to points in Iowa and Other States (1914), 29 I. C. C. Rep. 1, 15.
3. Straw Rates from Stations in Missouri to Alton, Ill. (1914), 29 I. C. C. Rep. 562, 563.
4. Douglas & Co. v. Chicago R. I. & P. Ry. Co. (1909), 16 I. C. C. Rep. 232, 237; Corporation Commission of the State of North Carolina v. Norfolk & W. Ry. Co. (1910), 19 I. C. C. Rep. 303.
5. Oregon & Washington Lumber Manufacturers Assn. v. Southern P. Co. (1911), 21 I. C. C. Rep. 389, 394.
6. Albree v. Boston & M. Rd. Co. (1912), 22 I. C. C. Rep. 303, 315.
7. Southern P. Co. v. Interstate Commerce Commission (1911), 219 U. S. 433, 55 L. Ed. 283, 31 Sup. Ct. Rep. 288.
8. *Chattanooga Log Rates* (1915), 35 I. C. C. Rep. 163, 168; cited in Rate Increases in Western Classification Territory (1915), 37 I. C. C. Rep. 114, 146.

#### 608-O. A CARRIER HAS NO RIGHT TO MAINTAIN A RATE ADJUSTMENT IN ORDER TO PRESERVE A COMMERCIAL PROFIT TO THE MANUFACTURER.

It is well settled that the Commission may not make the needs of the shipper the basis for reasonable transportation rates.<sup>1</sup>

The Commission has often said that it cannot require of carriers the establishment of rates which will guarantee to a shipper the profit-

able conduct of his business. The railway may not impose an unreasonable transportation charge merely because the business of the shipper is so profitable that he can pay it; nor, conversely, can the shipper demand that an unreasonably low charge should be accorded him simply because the profits of his business have shrunk to a point where they are no longer sufficient.<sup>2</sup>

The theory that an adjustment of rates to preserve a commercial profit to manufacturers and jobbers in all cases, if accepted as a necessary rule under the law, and generally applied, would be far reaching in its consequence, and clothe common carriers with a new function, to equalize at their own expense the net results of business operations, without regard to location or the conditions of handling and carriage. In many instances the work of the carrier would have to be done at less than cost, and in some for nothing. Such a rule is not admissible, therefore, as one of general application.<sup>3</sup>

If the farmer cannot, in a given locality, raise and ship produce to market at a profit upon the existing freight rate, that is no reason why the carrier should be compelled to accept less than a reasonable sum for its service.<sup>4</sup>

Conceding always that a carrier renders its services for hire, and is entitled to fair remuneration, which must necessarily include the cost of the service, a contribution to fixed charges, and something besides in the form of profit, the question arises, how large a carrier's margin of profit should be to render its charges reasonable to the patrons whom it serves. It is manifestly quite important on public grounds that the citizens who furnish a carrier with business from the pursuits in which they are engaged should not be oppressed with rates that are disastrous to their pursuits, as that a carrier should not be required to perform its service at a loss. The public good requires that benefits, as well as burdens, shall be justly distributed, and that one interest shall not profit unduly at the expense and to the serious prejudice of another. This is the spirit of the law. A carrier has the peculiar advantage of being able to apportion its aggregate expenses upon its whole business, but a grower of fruit, or of grain, or a manufacturer, cannot do so. The product he markets must alone bear the transportation expense, and if this is excessive, and deprives him of any return upon his investment, or from his labor or skill, his business is ruined and a public injury is sustained.<sup>5</sup>

The equitable rule doubtless is that rates should bear a fair and reasonable relation to the antecedent average cost of the traffic as delivered to the carrier for transportation, and the average market price the freight will command, or, as it is termed, the commercial value of the property. Carriers for the most part are believed to recognize this rule. A carrier cannot expect to absorb so much of the market price in its charges that the producer will be obliged to abandon his business. It is not meant by this that a carrier should transport freight at a loss to itself.<sup>6</sup>

If a market cannot be reached except at a loss with freight upon which only a just transportation rate is charged, it is no longer a legitimate article of commerce, and a carrier is under no duty to transport it at its own expense. But the principle intended to be

expressed is that, if a rate is so high as to yield a large profit to a carrier and to deprive its patrons of any profit, and make their business ruinous, then the interests of its patrons and the general public interest as well requires the carrier to remit a portion of its profits, and accept a rate more equitable both to carrier and patron. This is indispensable to make a rate reasonable and just.<sup>7</sup>

1. In the Matter of the Investigation and Suspension of Advances in Rates by Carriers for the Transportation of Cooperage from Salt Lake City, Utah, to Chicago, Ill., and between other points. (1912), 24 I. C. C. Rep. 656, 659; citing, Southern P. Co. v. Interstate Commerce Commission (1911), 219 U. S. 433, 55 L. Ed. 283, 31 Sup. Ct. Rep. 288. See Rate Increases in Western Classification Territory (1915), 37 I. C. C. Rep. 114, 150.
2. Board of Railroad Commissioners of the State of Kansas v. Atchison T. & S. F. Ry. Co. (1912), 22 I. C. C. Rep. 407, 410.
3. Thurber v. New York C. & H. R. Rd. Co. (1890), 3 I. C. C. Rep. 473, 2 I. C. Rep. 742.
4. Grain Shippers' Assn. of Northwest Iowa v. Illinois C. Rd. Co. (1889), 8 I. C. C. Rep. 158; Buchanan v. Northern P. Rd. Co. (1891), 5 I. C. C. Rep. 7, 3 I. C. Rep. 655.
5. Delaware State Grange v. New York P. & N. Rd. Co. (1891), 4 I. C. C. Rep. 588, 3 I. C. Rep. 554
6. Ibid.
7. Ibid.

#### 608-P. ADJUSTMENT OF RATES TO INDUCE MOVEMENT OF TRAFFIC.

If a carrier can profitably make a low rate for the purpose of bringing traffic into existence, which would otherwise pass over a competing line, then it may profitably, under some circumstances, make a low rate for the purpose of *bringing into existence* traffic which would not otherwise pass over any line.<sup>1</sup>

It is undoubtedly to the interest of carriers to adjust their rates so as to induce the movement of traffic, and it follows, therefore, that they should keep in close touch with commercial conditions pertaining to sale of commodities and the needs of communities, and adjust their charges when practicable within reasonable limitations, to meet those conditions and encourage sales and the movement of freight. While there is a mutual interest in sales and transportation, and it is proper that both seller and transporter should regard the same, the Commission, when called upon to determine what are just rates, must have due regard to the rights of the carriers as well as the interests of the shippers.

Notwithstanding the fact that the movement of traffic is encouraged and increased when carriers adjust their charges to meet mercantile interests, yet it cannot be held to be a duty of the carriers, in adjusting their charges, to equalize the value of commodities in their final distribution.<sup>2</sup>

1. Grain Shippers' Assn. of Northwest Iowa v. Illinois C. Rd. Co. (1889), 8 I. C. C. Rep. 158; Buchanan v. Northern P. Rd. Co. (1891), 5 I. C. C. Rep. 7, 3 I. C. Rep. 655.
2. Chicago Lumber & Coal Co. v. Tioga S. Ry. Co. (1909), 16 I. C. C. Rep. 323, 331; Chickasaw Compress Co. v. Gulf C. & S. F. Ry. Co. (1908), 13 I. C. C. Rep. 187.

#### 608-Q. THE RIGHT OF A RAILROAD COMPANY TO FIX ITS RATES.

The right of a railroad company to fix its rates does not depend upon the question whether its patrons are making or losing money in their business.<sup>1</sup>

Railroads have no right to graduate their charges in proportion to the prosperity which comes to industries whose products they transport.<sup>2</sup>

To make rates for transportation based solely upon the ability of the shipper to pay those rates, is to make the charge for transportation depend upon the cost of production rather than upon the cost of carriers—to measure a public service by the economies practiced by the private shipper. This necessarily gives to the carrier the right to measure the amount of profit which the shipper may make and fix its rates upon the traffic manager's judgment as to what profit he will be permitted. This theory entitles the railroad to enter the books of every enterprise which it serves and raise or lower rates without respect to its own earnings but solely with respect to the earnings of those whose traffic it carries. This is not regulation of railroads by the nation but regulation of the industries and commerce of the country by its railroads.<sup>3</sup>

In *Florida Fruit & Vegetable Shippers Protective Ass'n. v. Atlantic C. L. Rd. Co.*<sup>4</sup> the position of the growers is that such rates should be established as will permit them to market their product at a reasonable profit: *Held*, no such test of the justness of the transportation charge can be admitted.

The Commission has often said that it cannot require of carriers the establishment of rates which will guaranty to a shipper the profitable conduct of his business. The railway may not impose an unreasonable transportation charge merely because the business of the shipper is so profitable that he can pay it; nor conversely, can the shipper demand that an unreasonably low charge shall be accorded him simply because the profits of his business have shrunk to a point where they are no longer sufficient.<sup>5</sup>

The test of the reasonableness of a rate is not the amount of profit in the business of a shipper or manufacturer, but whether the rate yields a reasonable compensation for the service rendered. If the prosperity of the shipper is to have a controlling influence, this would justify a higher rate on traffic of the prosperous manufacturer than on that of one less prosperous. The right to participate in the prosperity of the shipper by *raising rates* is simply license to the carrier to appropriate that prosperity, or, in other words, to transfer the shipper's legitimate profit in his business from the shipper to the carrier. The increased prosperity of shippers along the line of a railway enlarges the business of those shippers, and, as a consequence, both the tonnage of traffic which they receive in their business and which they ship to their customers. In this way the carrier necessarily and justly participates in, or is benefited by, the prosperity of the shipper.<sup>6</sup>

The fact that a shipper has been prosperous, although a matter to be considered, does not conclusively show that the rates are not discriminatory.<sup>7</sup> The railroad rates from various points of production will determine so far as transportation is concerned the limit or the extent of the consuming territory which any given commodity can reach. In competition with others and in their desire for business, carriers may move a commodity as far as a remunerative rate will

permit—that is, if the compensation is something above the actual cost of the service, and it may be doubted whether carriers can go to this extent if the equipment so used is thereby diverted from the demands of other traffic offered to the carrier. Points producing the same commodity may be widely separated and be served by different carriers. It is manifest that the rates of the different carriers serving the different points will likewise determine the limits of the common competitive territory of the commodities from such points of production. Competitive rates made by several carriers serving the different points of production may be lower than they could be compelled to make. The law permits the making of a competitive rate to the extent above mentioned, but there is no law that requires the carriers to go to that extent. This controversy cannot be determined wholly upon the ground that complainants have enjoyed the lower rate for many years and that interests have been built up thereunder, and that loss of business, investments, profits, and markets will result under the increased rates. It must be determined on the justness or reasonableness of the rates in controversy.<sup>8</sup>

1. Union P. Ry. Co. v. Goodridge (1893), 149 U. S. 680, 13 Sup. Ct. Rep. 970, 37 L. Ed. 986; Florida Fruit & Vegetable Shippers Protective Assn. v. Atlantic C. L. Rd. Co. (1910), 17 I. C. C. Rep. 552, 560; Florida Fruit & Vegetable Shippers Protective Assn. v. Atlantic C. L. Rd. Co. (1911), 22 I. C. C. Rep. 11, 14.
2. Tift v. Southern Ry. Co. (1905), 138 Fed. Rep. 753; enforcing order of Commission in Tift v. Southern Ry. Co. (1905), 10 I. C. C. Rep. 548; Commission's order held to be valid. Southern Ry. Co. v. Tift (1906), 148 Fed. Rep. 1021; decree affirmed and Commission's order held to be valid. Carriers restrained from enforcing the advance; and reparation awarded in accordance with stipulation. Southern Ry. Co. v. Tift (1907), 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. Rep. 709.
3. In Re Investigation of Advances in Rates by Carriers in Western Trunk Line, Trans-Missouri and Illinois Freight Committee Territories (1911), 20 I. C. C. Rep. 307, 350, 351.
4. Florida Fruit & Vegetable Shippers Protective Assn. v. Atlantic C. L. Rd. Co. (1910), 17 I. C. C. Rep. 552, 560; cited in Truck Growers Assn. of Charleston District, Charleston, S. C. v. Atlantic C. L. Rd. Co. (1911), 20 I. C. C. Rep. 190, 195.
5. Board of Railroad Commissioners of the State of Kansas v. Atchison T. & S. F. Ry. Co. (1912) 22 I. C. C. Rep. 407, 410; In the Matter of the Investigation of Alleged Unreasonable Rates and Practices Involved in the Transportation of Wool, Hides and Pelts from Various Western Points of Origin to Eastern Destinations (1912), 23 I. C. C. Rep. 151, 156.
6. Central Yellow Pine Assn. v. Illinois C. Rd. Co. (1905), 10 I. C. C. Rep. 505, 535; Tift v. Southern Ry. Co. (1905) 10 I. C. C. Rep. 548; Jennison v. Great N. Ry. Co. (1910), 18 I. C. C. Rep. 113, 121.
7. Hitchman Coal & Coke Co. v. Baltimore & O. Rd. Co. (1909), 16 I. C. C. Rep. 512, 519.
8. Oregon & Washington Lumber Manufacturers' Assn. v. Union P. Rd. Co. (1908), 14 I. C. C. Rep. 1, 14.

#### 608-R. RIGHT OF CARRIER TO SHARE IN GENERAL PROSPERITY OF THE COUNTRY.

The freight rate is not a commodity the price of which should ordinarily vary with the price of the articles transported. A railroad may not advance its passenger fares simply because the people who ride are making more money. The question is, rather, whether the fare charged allows the carrier a fair return for its service.<sup>1</sup>

To the statement of this proposition exists a most important qualification. Some freight rates are largely a commercial proposition, and in so far they may properly vary with varying business conditions. For example, the price of the product of a particular factory may depend largely upon the price of the raw material, and in the cost of that

material the item of transportation by rail may enter as an important part. When the price of the product falls, the price paid for the raw material must also decline, and this necessitates a drop in the freight rate. It may happen that the freight rate is a sufficiently important part in the cost to the consumer, so that a reduction will stimulate consumption. A railroad often makes, and very properly makes, a low rate in times of depression, for the purpose of enabling a manufacturer to continue his business.<sup>2</sup>

To keep the factory in operation the railway may find it necessary to transport its raw material, its coal, its oil, and even its finished product, at a reduced rate. Whenever such depression has caused a reduction in rates, an advance may well follow the return of prosperity, but no such rule should be applied to cases where the reduction was not due to that cause.<sup>3</sup>

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1. In the Matter of Class and Commodity Rates from St. Louis and Texas Points in force over the lines of Missouri K. & T. Ry. Co. et al. (1905), 11 I. C. C. Rep. 238, 271.

2. Ibid.

3. In the Matter of Proposed Advances in Freight Rates (1903), 9 I. C. C. Rep. 382, 406.

#### 608-S. SERVICES IN THE DELIVERY AND RECEIPT OF TRAFFIC AT TERMINALS.

The expense of making delivery to consignees or to connections in large and congested cities often exceeds the cost of transportation for many miles, and must preferably be considered in determining the reasonableness of freight rates.<sup>1</sup>

The service performed on industrial sidings, as a general rule, is of greater value to the shipper and expense to the carrier than team-track service, but it is apparent that the receipt or delivery of carload freight on many of the industrial tracks entails no greater service or expense than would the receipt or delivery of the same cars on team tracks. Moreover, the additional cost of receiving or delivering carload freight on industrial tracks does not necessarily imply that the service is accessorial for which an addition may be made to the line-haul rate, or that it is other than a mere substitute for team-track receipts and deliveries. If cost of service were a controlling test of whether in a given case an additional service has been performed for which increased compensation may be exacted, it is evident that the terminal charge should vary as between different points in the same switching district, or even as between deliveries at the same point at different times. The fact that in a switching district all carload freight is not received or delivered at the same point and in the same manner presupposes variation in the cost of service and other minor differences incident to diverse circumstances and operating conditions.<sup>2</sup>

In the absence of tariff provisions to the contrary the line-haul rate of a particular carrier includes the receipt or delivery of carload freight only at industries or other points located upon its own rails.<sup>3</sup>

The delivery and receipt on industrial spur tracks within the switching limits in a city of carload freight moving in Interstate Commerce incident to a system-line haul, is not necessarily an added service for which the carrier is entitled to make, or should make, a charge additional to the line-haul rate to or from such city where that rate

imposes a receiving and delivering service at team tracks or at freight sheds within such switching limits for which the spur-track service is a substitute.<sup>4</sup>

In the case of *Railroad Commissioners of the State of Florida v. Florida E. C. Ry. Co.*<sup>5</sup> the Interstate Commerce Commission made the following statement: "We now come to the further contention advanced by the complainants, namely, that it is the duty of a common carrier by rail, as a matter of law, to deliver and receive carload freight on private sidings or spurs without making a separate charge for that service in addition to the line-haul rate. In using this point *Associated Jobbers of Los Angeles v. A. T. & S. F. Ry. Co.*, 18 I. C. C. Rep. 310, is relied upon by the complainants, apparently, as announcing a controlling rule of law to that effect that is of general application to such a service wherever performed. Such, however, is not the import of that case. A more careful reading of it will show that the conclusions reached were expressly restricted to the particular situation there before us. We did not there undertake to reach beyond the special facts of the case and to announce an administrative principle intended universally to control such a service when rendered elsewhere. When that case was on appeal before it, *Los Angeles Switching Case*, 234 U. S. 294, 310, 311, the Supreme Court of the United States was careful to point out that the rulings of the Commission were not made as matters of law, but 'as conclusions of fact,' and therefore were 'not open to review' by the court. In that connection it is well to note the following observations by the court:

"Nor do we understand that the Commission ruled that the receipt and delivery of goods at plants located upon spurs or sidetracks could not, in any circumstances, be regarded as a distinct service for which separate compensation might be demanded, \* \* \* and it is apparent that the ruling of the Commission would not apply in any case where by reason of the location and extent of the spur tracks and the character of the movement the facts were essentially different from those upon which the decision was based.

"\* \* \* But, laying the generalization on one side, it is plain that the question whether or not there is at any point an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether there is merely a substituted service which is substantially a like service to that included in the line-haul rate and not received, is a question of fact to be determined according to the actual conditions of operation.

. Such a question is manifestly one upon which it is the province of the Commission to pass.

"We must therefore take the findings of the Commission in the present case as to the character and manner of use of the industrial spurs in Los Angeles—that they constituted part of the carrier's terminals, and that under the conditions there existing the receipt and delivery of goods on these spurs was a like service as compared with the receipt and delivery of goods at team tracks and freight sheds—as conclusions of fact. Assuming that they were based upon evidence, they are not open to review."

The varying cost to shippers of delivering their product to the carrier for shipment can have no bearing in a case which has sole reference to what are lawful charges from the carrier's stations.<sup>6</sup>

In *California Citrus League v. Director General, Aberdeen & R. Rd. Co.*<sup>7</sup> the Commission stated: "The reductions claimed by complainant in the line-haul rate because of the additional charges paid by it for diversion, reconsignment, increased demurrage, and track storage cannot be allowed. These services are performed by the carriers for the shippers' convenience, and, in the case of demurrage and track storage, for the purpose of releasing equipment to obviate car shortage. If shippers elect to incur expenses of this character they should not thereafter complain, unless the individual charges are unreasonable *per se.*"

In *Wharton Steel Co. v. Director General, as Agent, Central Rd. Co. of N. J.*<sup>8</sup> the Commission stated: "The question presented is whether the switching service between the points of loading and unloading at complainant's plant, on the one hand, and the interchange tracks of the trunk lines at Wharton, on the other hand, is a transportation service on all proprietary traffic rather than a plant switching service. Transportation rates generally include adequate compensation for the acceptance and delivery of traffic. It is the duty of the carriers under the line-haul rate to deliver or receive carload freight at the usual points of unloading or loading unless such points are so located that the request for the receipt and delivery at such spots could not, in view of general usage, be regarded as reasonable. The line-haul rate, however, covers only one placement of the car for loading or unloading, and an additional charge may and should be made for each additional placement for that purpose. And whether such customary and reasonable delivery is made on the ordinary team track, switch track, or plant track of an industry it is a public transportation service. In *Car Spotting Charges*, 34 I. C. C., 609, we said at page 619:

"The fact is, however, that the service which the carrier renders in the movement of cars over the interior tracks of the industrial plant for the purpose of receiving and delivering carload freight of the industry is a public service, and the tracks are used both for that public service and for the private purposes of the industry."

In *Pittsburgh Forge & Iron Co. v. Director General, as Agent, Pennsylvania Rd. Co.*<sup>9</sup> the Commission stated: "Complainant sought to show by its cost figures that an allowance of \$1.82 per car should be made to it for the performance of interchange service as distinguished from intraplant service, and an award of reparation upon that basis is asked. The primary purpose of the complainant is to obtain an allowance from defendants rather than to require the defendants to perform the spotting services.

"Defendants have never made an allowance to complainant for the cost of performing the spotting services; and, except where complainant's engine was under repair or failed temporarily to function, defendants have not performed the service of placing cars at points of loading or unloading within the plant but have always delivered and received cars upon the interchange spur tracks indicated by complainant. This is not an instance where the failure and refusal of defendants to perform the spotting service or to make an allowance therefor has had the effect of increasing the line-haul rates since January 1, 1910. In this respect it is unlike *Stewart Iron Co. v. P. Co.*, 47 I. C. C., 512; *National Malleable Castings Co. v. P. & L. E. R. R. Co.*, 51 I. C. C., 537; and *Sharon Steel Hoop Co. v. P. Co.*, 51 I. C. C., 545, in which it was shown that following the *Industrial Railway Case*, 29 I. C. C., 212, defendants discontinued the allowances theretofore made and caused an increase in the line-haul rates which they failed to justify.

"In *Associated Jobbers of Los Angeles v. A. T. & S. F. Ry. Co.*, 18 I. C. C., 310, affirmed by the Supreme Court, 234 U. S., 294, it was disclosed that the general custom of carriers in this country has been to receive and deliver carload freight upon spur tracks leading to private industries at convenient points for loading and unloading without imposing a charge in addition to the line-haul rate includes the service of final delivery for the reason that rates generally in this country have constructed upon that basis. Consistent with the case

cited it is necessary to consider the character of the service for which allowance is here sought, the custom and general usage of the carriers with respect to terminal services, and whether the spotting service within the plant is in the nature of a substitute for team track service included in the line-haul rate. While the size of the plant does not relieve the carrier from the duty of performing the service contemplated under the line-haul rate, reasons of economy might justify the carrier in permitting the industry to perform the service for an allowance. It is well established that whatever service a carrier can be required to perform it may insist upon performing. *Atchison Railway Co. v. United States*, 199. Consequently, it is also necessary to give consideration to the question whether defendants may reasonably be required to perform the service here in question at the line-haul rates.

"Where, as in *General Electric Co. v. N. Y. C. & H. R. R. Co.*, 14 I. C. C., 237, the service of spotting cars within the plant is private in character and is performed by the shipper over a net work of intraplant tracks for its own convenience and in its own interest, the trunk lines are under no obligation to perform that service under the line-haul rate or to make an allowance to the industry for the performance of that service. In affirming the Commission's order in *Associated Jobbers of Los Angeles v. A. T. & S. F. Ry. Co.*, *supra*, the Supreme Court said:

"\* \* \* It is plain that the question whether or not there is at any point an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether there is merely a substituted service which is substantially a like service to that included in the line-haul rate and not received, is a question of fact to be determined according to the actual conditions of operation.

"At the hearing defendants offered to perform the service of spotting cars at convenient points of loading and unloading within the plant, provided it is their legal duty to do so and that it is done at their convenience. Complainant is willing that defendants should perform the service desired, provided they 'could do it as well as we do, without interfering with our plant' and 'they would do it at our convenience.' It is clear from complainant's testimony, however, that it prefers to do the work itself. Defendants are under no legal obligation to spot cars for complainant solely at its convenience. Nor are shippers entitled to an allowance from the carrier for service which the carrier is ready and willing to perform, and which the shipper performs because it is not convenient for it to permit the carrier to perform the service. *Car Spotting Charges*, 34 I. C. C., 609. Furthermore, defendants say that because of the excessive curvature in the plant tracks and the general location of tracks within the plant it is impossible for them to perform the spotting service for which an allowance is sought, although it appears that it may be practicable to relocate or modify the plant tracks sufficiently to accommodate defendant's locomotives. The engines used by defendants in general switching service are larger than complainant's engine. The engine used by one of defendants can negotiate a 40-degree curve. One of the plant tracks has a curvature of 60 degrees and another 50 degrees. Apparently it would be unsafe for defendants to use the plant tracks as at present laid out. On the other hand, complainant is able to perform the service more efficiently and economically than defendants, and in fact would not submit to the performance of the service by defendants at defendants' convenience.

"Defendants have never been asked by complainant to perform the service of spotting cars at points of loading or unloading within its plant or to make an allowance therefor. For forty years complainant has performed with its own engine the service for which it now seeks an allowance. These facts strongly indicate that the spotting service is more than the equivalent of a team track service, that it has not been regarded by complainant as a service included in the line-haul rate, and that no legal duty is imposed upon defendants to perform the spotting service, and we so find. Where an industry makes demand upon a line-haul carrier for an allowance for the performance of switching or spotting service by the industry, and where the line-haul carrier offers with its own power to perform the service but its service is not acceptable to the industry, there is no further obligation upon the line-haul carrier to perform that service.

"Though there may be no affirmative obligation upon defendants to perform the spotting services under the line-haul rates, they may not practice unjust discrimination or undue prejudice by making allowances to other shippers who are competitors of complainant provided substantially similar circumstances and conditions at competitors' plants are shown to exist."

In *Chicago Warehouse & Terminal Co. Terminal Charges*<sup>10</sup> authority to establish at Chicago, Ill., a terminal charge of two cents per 100 pounds to apply on interstate less-than-carload traffic between points beyond Chicago and industries and universal freight stations located on the Chicago Warehouse & Terminal Company, granted.

See "*Switching—Switch Connections—Private Side Tracks,*" Chapter 24 post.

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1. Hastings Malting Co. v. Chicago M. & S. P. Ry. Co. (1906), 11 I. C. C. Rep. 675.
  2. Boardman Co. v. Southern P. Co. (1915), 37 I. C. C. Rep. 81, 84.
  3. *Ibid.*
  4. Interstate Commerce Commission v. Atchison T. & S. F. Ry. Co. (1914), 234 U. S. 294, 58 L. Ed. 1319, 34 Sup. Ct. Rep. 814; cited in *Railroad Commissioners of the State of Florida v. Florida E. C. Ry. Co.* (1917), 42 I. C. C. Rep. 616, 624, and, *United States of America v. Belt L. Rd. Co.* (1919), 56 I. C. C. Rep. 121, 123. The history of this case, known as the "Los Angeles Switching Case," is as follows: *Associated Jobbers of Los Angeles v. Atchison T. & S. F. Ry. Co.* (1910), 18 I. C. C. Rep. 310. Carriers ordered to discontinue their present charge of \$2.50 per car, and in the future refrain from imposing any charge for delivering and receiving carload freight to and from industries located upon spurs and side tracks within their respective switching limits at Los Angeles, Calif., when such carload freight is moving in interstate commerce incidental to a system-line haul. *Atchison T. & S. F. Ry. Co. v. Interstate Commerce Commission* (C. C. D. Kansas 1st D.) bill by carriers to annul Commission's order transferred to Commerce Court. *Atchison T. & S. F. Ry. Co. v. Interstate Commerce Commission* (1911), 188 Fed. Rep. 229. Commerce Court temporarily enjoined enforcement of Commission's order on the ground that carriers have a right to impose a charge for this special service. *Interstate Commerce Commission v. Atchison T. & S. F. Ry. Co.* (1914), 234 U. S. 294, *supra*. Decree of Commerce Court reversed and cause remanded to District Court with instructions to dismiss the bill. See, also, the "San Francisco Switching Case" the history of which is as follows: *Pacific Coast Jobbers and Mfrs. Assn. v. Southern P. Co.* (1910), 18 I. C. C. Rep. 333. Carriers ordered to discontinue their present charge of \$2.50 per car, and in the future refrain from imposing any charge for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits at San Francisco, Calif., when such carload freight is moving in interstate commerce incidental to a system-line haul. *Southern P. Co. v. Interstate Commerce Commission* (C. C. D. Kansas 1st D.) Bill by carriers to annul Commission's order transferred to Commerce Court. *Southern P. Co. v. Interstate Commerce Commission* (1911), 188 Fed. Rep. 241. Enforcement of Commission's order temporarily enjoined on the ground that the carriers have a right to impose a charge for this special switching service. *Interstate Commerce Commission v. Southern P. Co.* (1914), 234 U. S. 315, 58 L. Ed. 34 Sup. Ct. Rep. 820. Decree of Commerce Court reversed and cause remanded to District Court with instructions to dismiss the bill.

5. Railroad Commissioners of the State of Florida v. Florida E. C. Ry. Co. (1917), 42 I. C. C. Rep. 616, 624.
6. Chicago Fireproof Covering Co. v. Chicago & N. W. Ry. Co. (1899), 8 I. C. C. Rep. 316, 330.
7. California Citrus League v. Director General, Aberdeen & R. Rd. Co. (1920), 58 I. C. C. Rep. 373, 380, et seq.
8. Wharton Steel Co. v. Director General, as Agent, Central Rd. Co. of N. J. (1920), 59 I. C. C. Rep. 11, 21.
9. Pittsburgh Forge & Iron Co. v. Director General, as Agent, Pennsylvania Rd. Co. (1920), 59 I. C. C. Rep. 29, 31, et seq.
10. Chicago Warehouse & Terminal Co. Terminal Charges (1919), 55 I. C. C. Rep. 363.

#### 608-T. LOW RATES TO TAKE CARE OF EMPTY CAR MOVEMENT.

That a large movement of return empty cars may rightfully, under certain circumstances, justify a lower rate, is undoubtedly true. When articles of traffic do not move on account of a rate which constitutes too great a burden, and the carrier is moving empty cars in the direction in which such articles would naturally move, at a lower rate, the carrier may be justified in carrying at a rate sufficient to bring about their movement, even at a rate barely remunerative. But no extra or additional charge in consequence can justifiably be put on other articles carried.<sup>1</sup>

In the *Import Rate Case*<sup>2</sup> the Supreme Court of the United States held that, where the acceptance of import traffic enables carriers to take advantage of the preponderance of empty car movement from ports of entry, any rates which the carrier may charge may be regarded as remunerative.

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1. Schumacher Milling Co. v. Chicago R. I. & P. Ry. Co. (1893), 6 I. C. C. Rep. 61, 4 I. C. Rep. 373.
  2. Texas & P. Ry. Co. v. Interstate Commerce Commission (1896), 162 U. S. 197, 16 Sup. Ct. Rep. 666, 40 L. Ed. 940, known as the "Import Rate Case."

#### 608-U. IMPORT DUTIES.

In *Florida Fruit and Vegetable Shippers' Protective Assn. v. Atlantic C. L. Rd. Co.*<sup>1</sup> the Commission said: "In establishing rates from Cuba in comparison with those from Florida, the carriers from Cuba have apparently insisted that the duty shall be counted as a part of the transportation charges. This is wrong. Congress has determined the amount of protection which shall be accorded the American industries, and the carriers should not wipe this out by their rates of transportation. While some slight advantage may be gained by the carrier of the foreign traffic, this is more than offset by the manifest wrong which results, and the irritation which it engendered. In the long run it is better for all railroads to rest content with a fair adjustment of rates. In this case these rates should be considered purely from a transportation standpoint."

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1. Florida Fruit and Vegetable Shippers' Protective Ass'n v. Atlantic C. L. Rd. Co. (1910), 17 I. C. C. Rep. 552, 561.

#### 608-V. MAPS OFFICIALLY PUBLISHED BY RAILROAD COMPANIES CONTROLLING AS TO TARIFFS.

In the case of *Crescent Coal & Mining Co. v. Chicago & E. I. Rd. Co.*<sup>1</sup> a railroad map published by the Railroad and Warehouse Commission of Illinois shows Depue & Northern as a steam railroad and

shows Depue, Nassau, and Howe as stations thereon. Defendant's answer that the official railway guide, the Rand-McNally, and the map published by the Illinois Commission, although they contain information furnished by the railroad companies, are not the official publication of those companies and cannot control the tariff. *Held*, this contention to be sound.

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1. Crescent Coal & Mining Co. v. Chicago & E. I. Rd. Co. (1912), 24 I. C. C. Rep. 149, 154.

#### 608-W. RATES OF WATER CARRIERS.

The fact that there is a water route affording a low rate from a given point to a certain destination does not justify the Commission in permitting rail carriers to charge an unreasonable rate to that given point.<sup>1</sup>

See "Water carriers," Section 320-A, *ante*; "Independent water carriers—Inland—Ocean," Section 406, *ante*; "Fourth Section of the Interstate Commerce Act—Long-and-Short-Haul Clause—Fourth-Section Applications," Chapter 7, *post*; "Water Carriers—Panama Canal Act," Chapter 50, *post*.

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1. Anaconda Copper Co. v. Director General, Ann Arbor Rd. Co. (1920), 57 I. C. C. Rep. 723, 734, citing, Southern P. Co. v. Interstate Commerce Commission (1911), 219 U. S. 433, 55 L. Ed. 283, 31, Sup. Ct. Rep. 288.

#### 608-X. AGGREGATE VALUE OF THE RAILWAY PROPERTY OF THE CARRIER HELD FOR AND USED IN THE SERVICE OF TRANSPORTATION

Under the Interstate Commerce Act, as it existed prior to the amendments effected by the Transportation Act of February 28, 1920, the questions of the value of railroad investment and the cost of construction, maintenance and operation of the road as elements to be considered in determining the reasonableness of rates constantly gave rise to considerable contention in rate issues when such matters were advanced by the carriers as reasons for permitting increases in the rates or pleaded by the carriers as a defense against the reduction in rates.

The Interstate Commerce Commission consistently held that rates cannot be said to be reasonable which are not reasonably remunerative to the carrier, and that rates which do not pay their full proportion of operating expenses, fixed charges, and reasonable dividends, are not *per se* or, "in and of themselves" reasonably remunerative.<sup>1</sup> The United States Supreme Court held in the *Nebraska Rate Case*<sup>2</sup> that a carrier is entitled to earn a fair return upon the value of that which it employs for public convenience and the service rendered. The railways there contended that they should be allowed to earn interest on their funded debts and dividends upon their capital stock. This claim the court denied, saying that it could not affirm as a matter of law, that a railroad was entitled to earn upon the basis of its capitalization. That case also established certain general principles upon which the reasonableness of rates from a revenue standpoint are to be decided.

It was, therefore, plain that until there be fixed, either by legislative or judicial interpretation, some definite basis for the valuation

of railroad property and some limit up to which that property should be allowed to earn upon that valuation, there could be no exact determination of these questions. In the absence of such a standard the tribunal, whether court or Commission, which was called upon to consider these matters, could only do so upon the exercise of its best judgment.<sup>3</sup>

With the passage of the Transportation Act of February 28, 1920, a vital change was effected in the power of the government over interstate freight rates and their effect upon the revenues of the carrier. Under the old law, there rested with the carriers the sole responsibility for securing sufficient revenue for the operation of their properties and compensation of their stockholders. This was accomplished by the initiation by the carriers of rates which were supposed to be just and reasonable in obedience to the mandate of the statute. It was, therefore, proper in all cases involving interstate rates for the carriers to introduce evidence in support of their claims that the rates in question were necessary to preserve the revenues of the carriers.

Section 15 of the Interstate Commerce Act, which was added by Section 422 of the Transportation Act of February 28, 1920, authorizes the Interstate Commerce Commission to increase the revenues of the carriers to a basis that will enable them to earn an aggregate net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation.

Thereafter, therefore, in all issues involving individual rates, any evidence which might be introduced on behalf of the carriers relating to revenue, cost of equipment, maintenance of way, improvements, betterments, etc., would be irrelevant, and the Commission would not be justified in giving consideration to any such testimony. *Such evidence is only proper in issues where sufficiency of revenue is the sole subject-matter of the particular inquiry.* It is apparent, that inasmuch as the carriers are guaranteed sufficient revenue by law and a special method provided in the statute for securing authority whereby sufficient revenue is to be obtained, a plea of insufficient revenue does not find proper place in a proceeding involving an individual rate on a particular commodity. When, therefore, the issue involved is as to the reasonableness of certain rates under a complaint filed by a shipping interest, the evidence must be confined to that issue.

Testimony with reference to increased cost of operation or reduction in revenue is only appropriate and admissible in proceedings initiated by the Interstate Commerce Commission to determine questions of sufficiency of revenue, the determination and publication of a fair return percentage, and the fixing of rates to yield a fair return on the value of the carriers' properties.

Section 15-a (17) of the Interstate Commerce Act, (*as amended February 28, 1920*) reads:

The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income by the carrier to the Commission in the public interest under the provisions of this section.

In its annual report to Congress for the year 1921,<sup>4</sup> the Interstate Commerce Commission made the following report under the subject of "Rate Readjustments:"

"Perhaps the most difficult task now confronting us, and certainly the one of greatest importance to the public, is the readjustment of freight rates which is necessitated by the changing conditions attendant upon the recovery of this country and others from the effects of the world war.

"During the war, and for some time after the signing of the armistice, the constantly rising operating expenses of the railroads made necessary very material increases in rates. It is unnecessary to refer particularly to what may be called minor readjustments, affecting only one or a few commodities in a restricted territory, although many of these resulted in substantial increases.

"On June 25, 1918, General Order No. 28 of the Director General of Railroads, providing increases in freight rates and passenger fares, certified as necessary in order to defray the expenses of Federal control and operation \* \* \*, became effective.

"The Congress is familiar with the situation of the railroads at the termination of Federal control, and with the various provisions in the transportation act, 1920, designed to remedy that situation. Among other things, the interstate commerce act was amended by adding a new section, designated section 15a. In this we were directed, in the exercise of our power to prescribe just and reasonable rates, to 'initiate, modify, establish or adjust' rates so that carriers as a whole, or as a whole in each of the rate territories established by us, under honest and efficient management, will earn, as nearly as may be, a fair return upon the aggregate value of the railway property of such carriers devoted to the public use.

"Following this enactment we instituted a proceeding, *Increased Rates, 1920*, 58 I. C. C., 220, to determine what rates would be necessary to give effect to the intent of Congress. This proceeding was discussed in our last annual report, at pages 6, et seq., and is briefly referred to as pages 7 and 8 of this report.

"Since that decision was promulgated on July 29, 1920, conditions throughout the country have changed to a marked degree. The general trend of commodity prices and of labor costs has been downward.

"We have been confronted with the demands of shippers, on the one hand, for reductions in rates which they allege are excessive and out of all proportion to the fallen values of commodities and which interfere with, or prevent, commodity movement; and, on the other hand, with the fact that the carriers have not been receiving the fair return contemplated by Congress. In this connection, we said in *Rates on Grain, Grain Products, and Hay*, 64 I. C. C., 85, 99:

"The purpose of section 15a was undoubtedly to better stabilize the credit of railroads, reassure investors, and attract capital to the railroad industry. It is plainly our duty to do everything in our power to carry out this purpose. The experience of the past 12 months, however, has shown the limitations which surround in actual practice the operation of this provision of the law. The increases of 1920 were intended to give the carriers the specified return, and no doubt they would have done so if the volume of traffic had remained normal. Instead, it fell off sharply, and net earnings failed by a considerable margin to reach the desired mark. Nevertheless, when it

became apparent that this would be the case, carriers and shippers alike agreed that it was not our duty, under section 15a, to raise rates to still higher levels. To have done this would clearly have been a vain thing, harmful alike to the country and to the carriers. The rate adjustment can not with advantage be made dependent upon fluctuations in traffic.

"It is also to be noted that the duty cast upon us by section 15a is a continuing duty and looks to the future. It does not constitute a guaranty to the carriers, nor is the obligation cumulative. We are not restricted by past or present statistics of operation and earnings. These are serviceable only as they illuminate the future. What is contemplated by the law is that in this exercise of our rate-making power the result shall reflect our best judgment as to the basis which may reasonably be expected for the future to yield the prescribed return."

"Many rate readjustments have been made since the increases authorized in *Increased Rates, 1920, supra*, became effective on August 26, 1920. Some were made by the carriers voluntarily, others at our suggestion, and still others under our requirement after formal hearing. In some adjustments there were both increases and decreases and in many others only decreases. It is safe to say that at least a million changes in individual rates have been filed with us. The increases were made to remove discrepancies in rate adjustments and classifications. The reductions have been material, entailing reductions in carrier revenue of millions of dollars.

"In Document No. 115, House of Representatives, 67th Congress, 1st session, is given a list of some of the more important reductions and readjustments of rates made since August 26, 1920, and it is not deemed desirable to burden this report with a detailed recital of the action taken in this regard. The reductions embrace rates on lumber, grain, hay, raw sugar, canned goods, coal, smelter products, iron ore, iron, and steel; on range cattle and other live stock; on potatoes and other vegetables; on sand, gravel, and other road-building material; and on other articles of commerce that move in large volume.

"The value of the service and the cost of transportation are among the important elements to be considered in determining the reasonableness of freight rates. These elements are, and for some time have been, in a state of flux. As a result, freight rates have not yet reached a condition of equilibrium."

See "*Railway Finances—Guaranteed Return on Railway Property,*" Chapter 55, post.

1. **Board of Trade of the City of Hampton v. Nashville, C. & St. L. Ry. Co.** (1900), 8 I. C. C. Rep. 503. The following are the more important cases before the Interstate Commerce Commission involving questions of railroad investments: Newland, et al. v. The Northern P. Rd. Co., et al. (1891), 6 I. C. C. Rep. 131, 4 I. C. Rep. 474; Brewster & Hanleiter v. Louisville & N. Rd. Co. et al. (1897), 7 I. C. C. Rep. 224; Grain Shippers' Assn. of Northwest Iowa v. Illinois C. Rd. Co. (1899), 8 I. C. C. Rep. 158; Johnson v. Chicago, St. P. M. & O. Ry. Co. et al. (1902), 9 I. C. C. Rep. 221; Mayor and City Council of Wichita, Kansas v. Atchison, T. & S. F. Ry. Co. et al. (1903), 9 I. C. C. Rep. 534; Central Yellow Pine Assn. v. Illinois C. Rd. Co. et al. (1905), 10 I. C. C. Rep. 505; Tift v. Southern Ry. Co. et al. (1905), 10 I. C. C. Rep. 548; Brabham et al. v. Atlantic C. L. Rd. Co. et al. (1905), 11 I. C. C. Rep. 464. Shippers & Receivers' Bureau of Newark v. New York, O. & W. Ry. Co. (1909), 15 I. C. C. Rep. 264; City of Spokane, Wash. et al. v. Northern P. Ry. Co. et al. (1909), 15 I. C. C. Rep. 376; Traffic Bureau of the Merchants' Exchange of San Francisco, Cal. v. Southern P. Co. (1910), 19 I. C. C. Rep. 259; In Re Investigation of Advances in Rates by Carriers in Official Classification Territory (1911), 20 I. C. C. Rep. 243; In Re Investigation of Advances in Rates by Carriers in Western Trunk Line, Trans-Missouri, and Illinois Freight Committee Territories. (1911), 20 I. C. C. Rep. 307; Boileau, et al. v. Pittsburgh & L. E. Rd. Co., et al. (1912), 24 I. C. C. Rep. 129, 132; Pittsburgh Vein Operators' Assn. of Ohio v. Pennsylvania Co. et al. (1912), 24 I. C. C. Rep. 280, 285; Arlington Heights Fruit Exchange et al. v. Southern P. Co. et al. (1912), 24 I. C. C. Rep. 671, 672; Johnson v. Chesapeake & O. Ry. Co. et al. (1912), 24 I. C. C. Rep. 698, 701; In the Matter of the Investigation and Suspension of Advances in Rates by Carriers

for the Transportation of Live Stock from Points in the State of New Mexico to Kansas City, Mo., and between other Points, (1912), 25 I. C. C. Rep. 63, 64; Edwards & Bradford Lumber Co. v. Chicago, B. & Q. Rd. Co. (1912), 25 I. C. C. Rep. 93, 96; Union Tanning Co. v. Southern Ry. Co. et al. (1912), 25 I. C. C. Rep. 112, 114; Multnomah Lumber & Box Co. et al. v. Southern P. Co. et al. (1912), 25 I. C. C. Rep. 123, 128; North Fork Cannel Coal Co. v. Ann Arbor Rd. Co. et al. (1912), 25 I. C. C. Rep. 241, 244; Taylor v. Norfolk & W. Ry. Co. (1912), 25 I. C. Rep. 613, 615; In the Matter of the Investigation and Suspension of Advances in Rates by Carriers for the Transportation of Coal and Coke in Carloads from points on the Louisville & Nashville Rd. to points on the Cleveland, C. C. & St. L. Ry. and other Destinations, (1913), 26 I. C. C. Rep. 20; In the Matter of the Investigation and Suspension of Advances in Rates by Carriers for the Transportation of Coal from the Walsenburg District of Colorado to Stations in Kansas, Oklahoma, and Texas (1913), 26 I. C. C. Rep. 85, 88; Hormel v. Chicago M. & St. P. Ry. Co. et al. (1913), 26 I. C. C. Rep. 112, 114; Union Tanning Co. et al. v. Southern Ry. Co. et al. (1913), 26 I. C. C. Rep. 159, 164; In the Matter of the Investigation and Suspension of Advances in Rates for the Transportation of Cypress Lumber Laths and Shingles from Points Located on the New Orleans, T. & M. Rd. to Albany, N. Y., and other Points (1913), 26 I. C. C. Rep. 186, 189; United States v. Wharton & N. Rd. Co. et al. (1913), 26 I. C. C. Rep. 309, 311; May Bros. v. Yazoo & M. V. Rd. Co. et al. (1913), 26 I. C. C. Rep. 323, 327; Memphis Freight Bureau v. Louisville & N. Rd. Co. et al. (1912), 26 I. C. C. Rep. 402, 405; Standard Mirror Co. et al. v. Pennsylvania Rd. Co. et al. (1913), 27 I. C. C. Rep. 200, 208; Traffic Bureau of Nashville v. Louisville & N. Rd. Co. et al. (1913), 28 I. C. C. Rep. 533, 535; Youngstown Sheet & Tube Co. et al. v. Pittsburgh & L. E. Rd. Co. (1914), 29 I. C. C. Rep. 428, 435; Railroad Commission of the State of Arkansas v. Missouri & N. A. Rd. Co. et al. (1914), 30 I. C. C. Rep. 488, 489, 491; Rental Charges for Insulated Cars, (1914), 31 I. C. C. Rep. 255, 257; The Five Per Cent Case (1914), 31 I. C. C. Rep. 351, 412; The Fifteen Per Cent Case (1917), 45 I. C. C. Rep. 303.

2. Nebraska Rate Case: Smythe v. Ames (1898), 169 U. S. 466, 52 L. Ed. 819, 18 Sup. Ct. Rep. 418. The following are the most important cases before the United States Courts involving questions of railroad investments: Illinois C. Rd. Co. v. Interstate Commerce Commission (1907), 206 U. S. 441, 51, L. Ed. 1128, 27 Sup. Ct. Rep. 700; Knoxville v. Knoxville Water Co. (1909), 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. (1909), 212 U. S. 19, 29 Sup. Ct. Rep. 192, 53 L. Ed. 382; Interstate Commerce Commission v. Union P. Rd. Co. (1912), 222 U. S. 541, 549, 32 Sup. Ct. Rep. 108; 56 L. Ed. 308; Knott v. Chicago B. & Q. Rd. Co. (1913), 230 U. S. 474, 57 L. Ed. 1571, 33 Sup. Ct. Rep. 975; Manufacturers Ry. Co. v. United States (1918), 246 U. S. 457, 38 Sup. Ct. Rep. 383, 62 L. Ed. 831; U. S. Ex. Rel. Kansas City S. Ry. Co. v. Interstate Commerce Commission (1920), 64 L. Ed. 517, 252, U. S. 178, 40, Sup. Ct. Rep. 187; Interstate Commerce Commission v. Chicago G. W. Ry. Co. et al. (1905), 141 Fed. Rep. 1903, affirmed 209 U. S. 108, 28, Sup. Ct. Rep. 493; Missouri, K. & T. Ry. Co. et al. v. Interstate Commerce Commission (1908), 164 Fed. Rep. 645; St. Louis & S. F. Rd. Co. v. Hadley et al. (1909), 168 Fed. Rep. 317; Missouri K. & T. Ry. Co. v. Love et al. (1910), 177 Fed. Rep. 493; Louisville & N. Rd. Co. v. Railroad Commission of Alabama et al. (1912), 196 Fed. Rep. 800; Western Ry. of Alabama v. Railroad Commission of Alabama et al. (1912), 197 Fed. Rep. 954; Montana, W. & S. Rd. Co. v. Morley et al. (1912), 198 Fed. Rep. 991; Louisville & N. Rd. Co. v. Railroad Commission of Alabama (1912), 196 Fed. Rep. 800; same case; Louisville & N. Rd. Co. v. Railroad Commission of Alabama (1913), 205 Fed. Rep. 800; Louisville & N. Rd. Co. v. Railroad Commission of Alabama (1913), 208 Fed. Rep. 35; South and North Alabama Rd. Co. v. Railroad Commission of Alabama (1913), 210 Fed. Rep. 465.
3. In Re Rates and Practices of Mobile & O. Rd. Co. (1903), 9 I. C. C. Rep. 373; affirmed, Central Yellow Pine Assn. v. Illinois C. Rd. Co. (1905), 10 I. C. C. Rep. 505.
4. 35th Annual Report of I. C. C. (1921), p. 5, et seq.

#### 608-Y. RATES ON DAMAGED, SECOND-HAND, AND USED ARTICLES.

In several cases the Commission has found that it would be difficult, without affording an easy and convenient means for misbilling and discrimination, and impracticable, to establish ratings on damaged, used, or second-hand articles different from those on like articles new.<sup>1</sup>

See "New and second-hand articles," Section 507, ante.

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1. Carnie-Goudle Mfg. Co. v. Atchison, T. & S. F. Ry. Co. (1922), 68 I. C. C. Rep. 40, 42, citing, Hirsch & Sons Iron & Rail Co. v. Washington, B. & A. E. Rd. Co. (1913), 26 I. C. C. Rep. 480; Danciger v. Pittsburgh, C. C. & St. L. Ry. Co. (1914), 29 I. C. C. Rep. 99.

**609. Reasonableness of freight rates.****609-A. REASONABleness OF RATES GENERALLY**

The mandate of the statute is that all rates must be just and reasonable, but how the reasonableness and justice of the rate are to be determined is not prescribed by the statute, nor has any satisfactory test been evolved by transportation experts. Conflicts about rates arise from conflicting interests of carriers and shippers. As carriers make their own rates, they have primary regard for their own interests, and often give less weight than they ought to the interests of those they serve. This is more frequently the case in the absence of competition. Under the stress of competition, or sometimes for the purpose of developing business, rates that are equitable or even very low are likely to be made. But when a controversy arises between the public and a carrier, the question of the reasonable limit of a rate usually involves many considerations, and is often difficult to determine. A rate that might be regarded as reasonable and just by a producer and shipper, might, from a carrier's standpoint, be deemed extremely unreasonable, and unjust, and so, conversely, a rate that a carrier might claim to be reasonable in itself, and that it might support with strong reasons based upon the cost of the service, the quantity of the business and the characteristics of its line of road, might exhaust the greater part of the proceeds of the producer's commodity and be destructive to its interests. It is only stating a truism, therefore, to say there is no recognized test of a rate mutually reasonable for a carrier and for the producer of a traffic.<sup>1</sup>

While, in making rates, railroad companies have a just right to insist that their interests and those of their stockholders shall be considered, the just claims of the public and the relative rights of communities, must also be taken into account and protected.<sup>2</sup> Carriers are not permitted in making their rates to regard only their own interests but must respect the interests of those who may have occasion to employ their services, and subordinate their own interests to the rules of relative equality and justice which the Act prescribes.<sup>3</sup>

The reasonableness of any rate must consequently be ascertained in every instance in which the question arises, by its relations both to the carrier and to the shipper, and by comparison with rates normally charged for like or similar service.<sup>4</sup>

Every question as to the reasonableness of a rate may present itself in two aspects. First, is the rate reasonable estimated by the cost and value of the service, and as compared with other commodities; second, is it reasonable in the absolute, regarded more clearly as a tax laid upon the people who ultimately pay it?<sup>5</sup>

The question of the reasonableness of a rate on a *single* article of traffic is one of almost insuperable difficulty. The carrier is entitled to earn a fair return upon the value of that which it employs for the public convenience. But the value of the entire property of the road sheds but little light on the question whether the rate on a single article yields its proper proportion of a fair return on that value. Thus the rate on one article of traffic may be unreasonably low and the returns to the

carrier from its entire business reasonably high. The deficiency under the rate on the single article being made up by the rates on other traffic. It follows that the reasonableness of the rate on a single article can only be determined by the proper tribunal upon the whole exercise of its best judgment in view of the value, volume, and other characteristics affecting the transportation of the particular article.<sup>6</sup>

Great weight should be given to the opinion of expert witnesses; the effect of the rates on the growth and prosperity of the places to and from which they are charged; the cost of transportation as compared with the rates; and the rates in force at numerous other places where the circumstances are as nearly similar as may be to those prevailing at the point in question.<sup>7</sup>

There is a wide difference in the character of testimony required to test the reasonableness of an *entire schedule* of rates covering the whole traffic of a particular carrier and that required to test the reasonableness of a rate on a particular commodity between two definite points. Whether an attack upon an entire schedule of rates is well founded or not is to be determined largely by ascertaining whether the gross amount of traffic carried on those rates affords the carrier, above its operating expenses and taxes, a reasonable return upon the fair value of its property.<sup>8</sup>

In *Anaconda Copper Mining Co. v. Director General, Ann Arbor Rd. Co.*<sup>9</sup> the Commission stated: "While the shipper is entitled to a reasonable rate the carrier is at the same time entitled to a reasonable return." Carriers are entitled to reasonable rates for the service they render even though those rates may be such that shippers cannot do business at a profit. *Railroad Commissioners of Florida v. Southern Express Co.*, 28 I. C. C. 634, 635. Commercial advantages and disadvantages are not factors that can have any great consideration by us in reaching conclusions as to the propriety of rate structures. *Illinois Coal Cases*, 32 I. C. C., 659, 680."

1. *Delaware State Grange v. New York P. & N. Rd. Co.* (1891), 3 I. C. Rep. 554, 4 I. C. C. Rep. 588. Carriers ordered to reduce to a specified amount the rates on fruits and vegetables and other perishable freight from Delaware and Maryland to Jersey City, N. J., and Philadelphia, Pa., on the ground that existing rates were unreasonable. *Interstate Commerce Commission v. New York P. & N. Rd. Co.* (C. C. E. D. Va.). Not reported. Commission's orders held to be invalid. No appeal. See Seventh Annual Report, p. 29; Senate Hearings, Committee on Interstate Commerce, 1904-5, Volume 5, p. 312.
2. *Interstate Commerce Commission v. East Tennessee V. & G. Ry. Co.* (1898), 85 Fed. Rep. 107, 112.
3. *Freight Bureau of Cincinnati v. Cincinnati N. O. & T. P. Ry. Co.* (1894), 6 I. C. C. Rep. 195, 245, 4 I. C. Rep. 592.
4. *Delaware State Grange v. New York P. & N. Rd. Co.* *supra*.
5. *In Re Proposed Advances in Freight Rates* (1903), 9 I. C. C. Rep. 382, 401.
6. *Central Yellow Pine Assn. v. Illinois C. Rd. Co.* (1905), 10 I. C. C. Rep. 505.
7. *Interstate Commerce Commission v. Southern Ry. Co.* (1902), 117 Fed. Rep. 741; affirmed, *Interstate Commerce Commission v. Southern Ry. Co.* (1903), 122 Fed. Rep. 800, 60 C. C. A. 540. Appeal from the United States Circuit Court of Appeals dismissed. *Interstate Commerce Commission v. Southern Ry. Co.* (1904), 195 U. S. 639, 49 L. Ed. 356, 25 Sup. Ct. Rep. 790.
8. *Frye & Bruhn, Inc. v. Northern P. Ry. Co.* (1908), 13 I. C. C. Rep. 501, 507; cited, *The Alaska Investigation* (1917), 44 I. C. C. Rep. 680, 693.
9. *Anaconda Copper Mining Co. v. Director General, Ann Arbor Rd. Co.* (1920), 57 I. C. C. Rep. 723, 732.

#### 609-B. RATES AND REBATES.

In *Western Advance Rate Case*<sup>1</sup> the Interstate Commerce Commission said: "Having in mind the theory presented by Mr. Ripley and others as to the value of the service to the shipper being the controlling

factor in the determination of a reasonable rate, let us regard the significance of the specific problem presented in this case. Here we have a number of commodities which were given special rates by the carriers at a time anterior to the period of regulation of rates—rates which are lower than the class rates applicable to such commodities. The extension of preference to these commodities was made when carriers were proceeding upon the value-of-service theory and when there was a real competition between carriers, at least in this, that the carriers bid against each other for the business by giving a percentage off the published rate—a rebate. To what extent this practice obtained as to those particular rates does not appear, but the record clearly shows that rates between Chicago and the Missouri River were deeply cut as to the higher classes. The general rebate on first-class traffic between the Atlantic Seaboard and Kansas City, for instance, was 40 per cent. This rebate is not cited as sporadic; such deduction was given to all the largest shippers of this character of traffic. And yet, be it parenthetically said, after those rebates were cut off and the full rate exacted, and this Commission made a reduction of about 6 per cent in this rate on complaint of shippers, the carriers appealed to the courts, and throughout almost the entire life of our order the courts by injunction maintained in effect the higher rates, which the carriers themselves had never exacted, excepting for the unknowing or smaller shippers.

"It is not to be thought, however, that such a rebate as 40 per cent on all classes of traffic was general. The lower classes were subject to a less reduction and the commodity rates were themselves too often rebates. We have the word of no less an authority than Mr. Stickney, the late president of the Chicago Great Western, to this effect, and this suggestion is made by all the traffic men appearing in this inquiry.

"We then find this situation existing—a body of class rates which were applied where no bargain was made between shipper and carrier, but always subject, as to competitive business, to a reduction sufficient to secure the traffic. Supplementing these rebated class rates the convenient commodity rate served as a vehicle for the preference desired. These rates varied from time to time. They were unstable because they were 'made to get the business.' The carriers did not give them voluntarily—that is, out of any goodness of heart—but rivalry between carriers made each road vie with its competitor in the volume of traffic secured, for every ton carried above the most uncertain minimum was profitable. It may have been that a sense of propriety, of 'decency,' had something to do in the establishment of these commodity rates; that there was a feeling in the traffic manager's mind that the class rates were too high in themselves to be justifiable, and while admittedly they might be had from the unwary and infrequent shipper, it was unjust to exact them from regular patrons. Be that as it may, however, we have the testimony of one of the best-informed authorities that from 3 to 5 per cent of the total gross freight earnings of these carriers were returned to the shippers as rebates. In a territory, where freight earnings ran into the hundreds of millions each year, even so conservative an estimate as 3 per cent makes evident how real the reduction in the rates which the great industries and jobbers paid. This was saved to the carriers when the Elkins law became enforceable, and was enforced; and all these rebates 'came

out of the net.' Here then was a raising of rates to many shippers and a consequent increase in the net revenues of the railroads. An era of regulation had come; the carriers were to be saved from a devouring competition which put them in good times at the mercy of the most insidious traffic buyer and in the worst of times brought peril of rate wars, which led down a steep path to the federal court and the railroad receiver. In all the criticism of federal regulation—its implied absurdity as against inspired individual regulation—to which we have listened in this case, no one of the railroad men has spoken with deserved appreciation of the rich harvest that the railroads have reaped from the enactment and enforcement of the laws against preferential rates and individual discriminations. With the whole force of the Government behind them the carriers have laid a burden upon the shippers—and they are loath to pay tribute to the power which has saved them from themselves.

"The rebate from the published rate became unfashionable; it was discredited by law, and railroad society regarded it askance. But the rates were still to be made by traffic managers who sat together in conference and 'competed with each other across a table.' This gave it into the hands of the most considerate of traffic men to say what the rate should be; for all must do as one insisted he would do. The day of open 'scalping' of rates had passed, but the shipper who for 20 years had marketed his commodity upon a more or less fixed variant from the published charge was full of protest and perhaps of threat. To meet this situation the commodity rate was always available. And where class rates had not been exacted in full, a commodity rate could be made to care for the shipper's demands and perhaps his needs. So we find many new commodity rates put into effect after the Elkins Act, which represented the existing and actual rate as distinguished from the paper or published rate. An effort was made also to raise existing commodity rates to a higher level—toward the class scale. But there was still left sufficient of vitality in the shipper to compel a retreat in many of these raises. The era of competition between carriers had not altogether closed; it could not end so long as shippers had it in their power to route shipments as they chose and the pooling of freights remained under the ban of the law. So the effort to bring up the commodities of lesser volume to a higher level of rates was abandoned, or at least deferred. These are the commodities involved in this case, on which the carriers sought to raise the rates in 1905, but soon retreated to present figures. They now propose new rates, approximating those of 1905.

"It takes little imagination to draw a parallel between this picture and that which England saw, and to which we have earlier referred, when upon the enactment of the maximum rate law by the British Parliament the British carriers were no less slow than their American brethren to raise their rates. 'If we are to have regulation,' said both sides of the ocean, 'we will secure its full benefits.' And there soon followed in America as in England legislative restrictions upon such action. Human nature, in the railroad offices of England and of America, and in the legislatures of both countries, is much the same, and follows along easily traceable lines of identity."

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1. *In Re Investigation of Advances in Rates by Carriers in Western Trunk Lines, Trans-Missouri and Illinois Freight Committee Territories (1911)*, 20 I. C. C. Rep. 307, 351 et seq.

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#### 609-C. MANDATE OF STATUTE THAT TRANSPORTATION CHARGES BE JUST AND REASONABLE

Section 1 of the Interstate Commerce Act (*as amended February 28, 1920*), after defining the term "transportation" to include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of carriage, irrespective of ownership, or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storing, and handling of property transported declares that all charges made for any service rendered or to be rendered in the transportation of property, or in connection therewith shall be just and reasonable and that every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.<sup>1</sup>

To afford an effective means for redressing wrongs resulting from unjust discrimination and undue preference was among the principal purposes of the Act, and the means by which those purposes were to be accomplished was the placing upon all carriers the positive duty of establishing schedules of reasonable rates which should have a uniform application to all, and which should not be departed from so long as the established schedules remain unaltered in the manner provided by law.<sup>2</sup>

This provision, insofar as it inhibits carriers from the imposition of unjust and unreasonable rates, is an express adoption by Congress of the principles of the common law.<sup>3</sup> Where a carrier promulgates a schedule of rates, it acts under the mandate of the Act and the common law that all rates must be fair and reasonable, and subject to the rule that it will be liable for an action in damages subject by the shipper due to any unreasonable exaction.<sup>4</sup>

1. Section 1 (5) Interstate Commerce Act.

2. Texas & P. Ry. Co. v. Abilene Cotton Oil Co. (1907), 204 U. S. 428, 439, 27 Sup. Ct. Rep. 350, 51 L. Ed. 553; reversing, (Tex. Civ. App.) 85 S. W. 1052.

3. Tift v. Southern Ry. Co. (1903), 123 Fed. Rep. 789; affirmed, Tift v. Southern Ry. Co. (1905), 138 Fed. Rep. 753; affirmed, Southern Ry. Co. v. Tift (1907), 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. Rep. 709.

4. Southern P. Co. v. Colorado Fuel & Iron Co. (1900), 101 Fed. Rep. 779, 42 C. A. 12.

#### 609-D. MEANING OF THE TERMS "JUST" AND "REASONABLE."

The words "reasonable" and "just," as used in the Statute as applied to rates, are each relative terms. They do not mean to imply that the rates upon every railroad engaged in interstate commerce shall be the same or even about the same. The conditions and circumstances of each road surrounding the traffic and which enter into and control the nature and character of the service performed by the carrier in the transportation of property, such as the cost of transportation, which involves volume or lightness of traffic, expenses of construction and of operation, competition in some respects of carriers, rates made by shorter and competing lines to the same points of destination, space occupied by freight, value of freight and risk of carriage to carrier, all have to be considered in determining whether a given rate is "reasonable" and "just."

The standard of the law by which the validity of any rate as effected by its amount is determined, is not more definite than that it must be just and reasonable. The test of reasonableness can be implied only by reference to and upon consideration of all pertinent facts, circumstances, and conditions affecting the rate in effect at any particular time. In the nature of the case there can be no rule or process whereby the definite absolute maximum limit of reasonableness in the amount of a rate can be fixed with the certainty of a demonstration.<sup>2</sup>

A just and reasonable rate must be one which respects alike the carrier's deserts and the character of the traffic. It cannot be a rate that takes from the carrier a profit and thus favors the shipper at the carrier's expense, nor is it one which compels the shipper to yield for the transportation given a sum disproportionate either to the service given by the carrier or to the service rendered to the shipper. The words "just and reasonable" imply the application of good judgment and fairness, of common sense and a sense of justice to a given condition of facts. They are not fixed, unalterable, mathematical terms. Their meaning implies the exercise of judgment, and against the improper exercise of that judgment the Constitution gives protection, at least as far as the carriers are concerned.<sup>3</sup>

To be just and reasonable, within the meaning of the constitutional guaranty, the rates must be prescribed with reasonable regard for the cost to the carrier of the service rendered and for the value of the property employed therein; but this does not mean that regard is to be had only for the interests of the carrier, or that the rates must necessarily be such as to render its business profitable, for reasonable regard must also be had for the value of the service to the public. And where the cost to the carrier is not kept within reasonable limits or where for any reason its business cannot reasonably be so conducted as to render it profitable, the misfortune must fall upon the carrier, as would be the case if it were engaged in any other line of business.<sup>4</sup>

Tested by these rules, a rate may be a very reasonable and just rate on one railroad and not reasonable and just on another. For example, a rate that would be reasonable and just on the New York Central & Hudson River Railroad may be so low that it would force the Minneapolis & St. Louis Railway into bankruptcy in less than thirty days; and a rate that might be reasonable and just on the Minneapolis & St. Louis Railway might be so high that if attempted to be enforced on the New York Central & Hudson River Railroad for thirty days, it would practically destroy the business of the latter. This diversity is most observable in the different portions of the country, as, for instance, between lines of railroad in the Southern States or the States of the far West, on the one hand, and the railroad lines of the Middle and Eastern States on the other. Where, however, railroad lines reach the same common points, are located in the same territory, and compete with each other, as well as with other lines, for the business of that territory, their rates are, in general, much the same, and this is one of the necessities of the situation. Even among the rail carriers where there is no opposing water competition there may be occasional differences in rates that will be found substantially justified by the different circumstances and conditions under which the lines are operated.<sup>5</sup>

A reasonable rate, therefore, is one that will make just and fair return to the carrier when it is charged to all who are to pay it without unjust discrimination against any, and when the revenue it produces is subject to no improper reduction.<sup>6</sup>

1. New Orleans Cotton Exchange v. Illinois C. Rd. Co. (1890), 3 I. C. C. Rep. 534, 2 I. C. Rep. 777.
2. Anadarko Cotton Oil Co. v. Atchison, T. & S. F. Ry. Co. (1910), 20 I. C. C. Rep. 43, 49.
3. In the Matter of the Investigation and Suspension of Advices in Rates for Transportation of Coal by the Chesapeake & O. Ry. Co. et al, and Their Connections (1912), 22 I. C. C. Rep. 604, 624.
4. Missouri K. & T. Ry. Co. v. Interstate Commerce Commission (1908), 164 Fed. Rep. 645, 648.
5. New Orleans Cotton Exchange v. Illinois C. Rd. Co. *supra*.
6. Fourth Annual Report of Interstate Commerce Commission (1890),

The question of the reasonableness of a rate is one of fact.<sup>1</sup> That is, facts as they exist when it is sought to put such rate schedule into operation.<sup>2</sup>

1. Illinois C. Rd. Co. v. Interstate Commerce Commission (1907), 206 U. S. 441, 51 L. Ed. 1128, 27 Sup. Ct. Rep. 700.
2. Smyth v. Ames (1897), 171 U. S. 361, 43. L. Ed. 197, 18 Sup. Ct. Rep. 888.

#### 609-F. JUST AND REASONABLE TRANSPORTATION REGULATIONS AND PRACTICES REQUIRED TO BE ESTABLISHED BY CARRIERS.

Section 1 (6) of the Interstate Commerce Act (*as amended July 18, 1910*), provides as follows:

It is hereby made the duty of all common carriers subject to the provision of this Act to establish, observe and enforce \* \* \* just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marketing, packing, and delivery of property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transport, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every unjust and unreasonable classification, regulation and practice is prohibited and declared to be unlawful.

#### 609-G. ENFORCEMENT OF RULES AND REGULATIONS NOT SHOWN IN PUBLISHED TARIFF AS AFFECTING THE REASONABleness OF THE RATE.

Section 6 (1) of the Interstate Commerce Act after making it the duty of every common carrier subject to its provisions, to print, file, and keep open to public inspection, schedule showing all the rates and charges for transportation in which it is engaged, provides as follows:

The schedules printed as aforesaid by such common carrier shall plainly state the places between which property \* \* \* will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules and regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, \* \* \* and charges, or the value of the service rendered to the \* \* \* shipper, or consignee.

The main purpose of this provision is to prevent unjust discrimination between shippers by making it possible for them to readily ascertain from the tariffs just what aggregate charges are to be assessed, and the law is specific to the effect that carriers shall not

demand "a greater or less or different compensation than the rates and charges specified in the tariff filed and in effect at the time."<sup>1</sup>

In the case of *Voorhees v. Atlantic C. L. Rd. Co.*<sup>2</sup> the complainant shipped six carloads of cabbage from St. Andrews, S. C., to New York City, for the transportation of which the defendants charged their less-than-carload rate, because the initial carrier performed the loading service; *Held*, That these shipments having been offered in carload quantities were entitled to the published carload rate, and in the absence of specific tariff provisions no additional charge could be lawfully collected from complainant to cover the loading service performed by the railroad company.<sup>3</sup>

A rule providing who shall load and unload the freight transported (i. e., whether the shipper or carrier), directly affects the rate, since it determines the value of the service to the shipper.<sup>4</sup>

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1. *Voorhees v. Atlantic C. L. Rd. Co.* (1909), 16 I. C. C. Rep. 42.

2. *Ibid.*

3. *Ibid.*

4. *Wholesale Fruit & Produce Assn. v. Atchison, T. & S. F. Ry. Co.* (1908), 14 I. C. C. Rep. 410.

**609-H. FREIGHT RATES TO BE ON A BASIS THAT WILL YIELD AN AGGREGATE ANNUAL NET OPERATING INCOME EQUAL, AS NEARLY AS MAY BE, TO A FAIR RETURN UPON THE AGGREGATE VALUE OF THE RAILWAY PROPERTY OF THE CARRIER HELD FOR AND USED IN THE SERVICE OF TRANSPORTATION.**

See "*Railway Finances—Guaranteed Return on Railway Property*," Chapter 55, post, and, "*Aggregate value of the railway property of the carrier held for and used in the service of transportation*," Section 608-X, ante.

**609-I. A RATE, REASONABLE per se, MAY BE UNLAWFULL ON OTHER GROUNDS.**

The fact that a rate is *per se* reasonable does not prove that it may not be unlawful on other grounds. If rates are relatively unjust so that undue preference accrues under them to one person or locality, or an undue prejudice results to another person or locality, the law is violated, although the higher rates are not in themselves unreasonable.<sup>1</sup>

The duty to prove that a certain rate is reasonable *per se* includes the duty to prove that it is relatively reasonable, i. e., that it does not operate to unjustly discriminate.<sup>2</sup>

*In the Matter of Chicago, St. P. & K. C. R. Co.*<sup>3</sup> Chairman Cooley, in delivering the opinion of the Commission, said: "The Commission is of the opinion that the phrase, 'Rates reasonable in and of themselves,' which is often made use of in similar cases to the present, is very likely to be misleading. It is a phrase which seems to imply that the particular rates may be considered by themselves as if they were and could be affected by no others. \* \* \* But it is not the theory of the Act to Regulate Commerce that the reasonableness of rates can thus be separately and independently determined. On the contrary, it is assumed in the Act that persons, corporations and localities are

interested not only in the rates charged to them, but in the rates which are charged to others also and, while the Act does not require all rates to be proportional, it nevertheless makes the element of proportion an important one when the rates for any locality are to be determined. No rates can therefore be reasonable in and of themselves within the contemplation of the Act which are made regardless of proportion."

1. *Bennett & Son v. Chesapeake & O. Ry. Co.* (1916), 38 I. C. C. Rep. 310, 313; *Through Rates to Points in Louisiana and Texas* (1916), 38 I. C. C. Rep. 153, 162; citing, *Board of Trade of Lynchburg v. Dominion S. S. Co.*, 6 I. C. C. Rep. 632; *Lumbermen's Exchange of St. Louis v. Anderson & S. R. Rd. Co.* (1912), 24 I. C. C. Rep. 220; *Transcontinental Commodity Rates* (1914), 32 I. C. C. Rep. 449.
2. *San Jose Chamber of Commerce v. Atchison, T. & S. F. Ry. Co.* (1914), 32 I. C. C. Rep. 449, 452; cited in *Drain Tile from Illinois Points* (1915), 35 I. C. C. Rep. 83, 85.
3. *In the Matter of Chicago, St. P. & K. C. Ry. Co.* (1888), 2 I. C. Rep. 187.

#### 609-J. THE REASONABLE RATE AND COST OF SERVICE.

In *Western Advance Rate Case*<sup>1</sup> the Interstate Commerce Commission stated: "Thus we return to the question, What is the reasonable rate that shall be charged to the shipper? The legislature may not make rates so as to confiscate the carrier's property. The carrier, on the other hand, may not make rates which are unjust to those who by economic necessity are compelled to employ its services. Here, then, we have the minimum of legislative power and the maximum of the carrier's power. Between these lies a zone, indefinite and variable. Without question the carrier will tend toward the maximum, while governmental authority will be inclined—in fact, has been created—to repress this upward tendency. One moves inevitably upward to the highest rate which the traffic will bear; the other attempts to discover some relation between charge for service and cost of service.

"The present record is full of contrasts between these two lines of tendency. The carriers, for instance, gave the following as their full justification as to the reasonableness of each and all of the proposed advanced rates in and of themselves: 'in making up the tariff,' said the vice president of the Burlington road (and all other carriers adopted this testimony as their own), 'we considered each individual item, and we made no increase which in our judgment would materially affect the movement of the business or place an undue burden on the traffic. I think that the present rates were originally established to meet in many cases conditions that no longer exist, and that the same necessity from a commercial standpoint does not exist now as did when the rates were originally established, and that as a rule the value of the commodity is greater, and the shipper and consignee are both better able to pay approximately the same rate to-day than they were to pay these special commodity rates when they were originally established. We, as I have stated, advanced no rate beyond a figure which in our judgment it could stand and freely move.' A full hearing was extended to all carriers as to the reasonableness from its standpoint of each rate involved, with no further result than this one answer.

"The Supreme Court has said that one of the elements which should be given consideration in the establishment of a reasonable rate was the cost of the service, *Smyth v. Ames*, *supra*, but this is regarded by railroad men as an almost negligible factor.

" 'I think,' said Mr. Ripley, 'that the cost of service is only one of the items to be considered in the making of a reasonable rate, and not a very important item at that—either the cost of service or the returns made on capital. I think that while they may be considered under certain conditions they are remote.' And again, 'I think that the cost of the service has very little consideration in the making of rates. Rates are made without a consciousness on the part of the carrier's agent of the return that these rates will bring,'

"This is the purport of more of Mr. Ripley's testimony, and it is to be remembered in this connection that Mr. Ripley's experience as a traffic manager has extended from the Atlantic to the Pacific coast and over several great systems of railroad. 'The maker of the rate,' he says, 'in the first instance must make the rate such as to permit of the freest intercourse and the freest interchange of commodities in the country, regardless of capital, regardless of cost—almost regardless of cost, but entirely regardless of capital.' Then being asked as to whether the Commission should make rates after this railroad fashion, he said, 'I think they (the Commission) should consider the value of service first and foremost and leave the cost and the value of the properties to altogether secondary consideration.' He was asked if he had said that the making of freight rates 'has not, never did have, never will have, never ought to have, any relation to the capitalization of the railroads,' to which he replied that this was a correct expression of his views.

"Discarding the elements of cost and capitalization, he was asked to define a reasonable rate, and replied that it was one that the traffic would bear, 'and the amount that the traffic would bear,' he said, 'is that amount of charge at which it will most freely move over the lines of transportation.' This definition he again repeated when he was asked if the phrase 'what the traffic will bear' meant the rate at which the commodities would 'most freely move over the lines of the carrier,' to which he replied, 'I will qualify that by saying, "What the traffic will bear and still move most freely and enable the products and the manufactures of one part of the country to be used to the utmost possible extent in the other."'

"This is the latest, the most modern, and most liberal definition of this much-abused phrase. Indeed, it is so liberal that it is impracticable unless properly qualified. Mr. Ripley would not have us understand that a railroad is an eleemosynary institution. To say that a reasonable rate is one under which the traffic will most freely move is to say that is the rate which casts the least burden upon the shipper. The rate that will carry the traffic farthest for the smallest amount of money—the lowest possible rate. But all of the time there is present in the mind the necessity of securing out of all of such rates not only the cost of transportation, which Mr. Ripley regards as negligible, but an adequate return upon the value of the property used. While this definition, therefore, sounds to the ear most philanthropic, it was doubtless not intended to convey any more subtle or philosophic meaning than this: That an individual rate should not be made with reference to the cost of the service to the railroad, nor should it be made with regard to the return which it would yield to the capital invested in the plant. It should be made so low that as great a body

as possible of that character of traffic should move, but all the time there must be borne in mind the fact that out of its aggregate rates the property must be made to pay. This is the American system of railroad rate making.

"'What the traffic will bear' may mean 'all that the traffic will bear.' If it means that the rate must be measured by the amount that the shipper is willing to pay under necessity, it is extortion. On the other hand it may mean the least return for which the carrier can afford to transport the traffic. This theory of rate making seems to be that there is a certain amount of traffic which is to be moved, or which can be moved; that the rate should not be so high as to prevent any of this traffic from moving, nor should it be a lower amount than the carrier can obtain and still permit the freest possible movement. Such definition apparently makes the rate entirely a matter of judgment as to which there may be error. And, carried to its last degree, it permits indefinite discrimination between individuals, as well as between communities, for if the rate is to be made so as to permit the freest possible movement one shipper may not be able to extend his market at the rate given to another. Therefore, he is entitled to a rebate. And the more distant community may not be able to compete with the nearer community for a common market. And therefore it is entitled to a lower rate than its more advantageously situated competitor. The experience of the commercial world led to the enactment of the act to regulate commerce which interfered with the full application of this theory, and we, of course, assume that Mr. Ripley stated his principle of rate making, not only with the limitation we have already noted—that rates were to be made so that, as a whole, they yielded adequate return to the carrier—but with the further limitation that they must be subject to the prohibitions of the law. Manifestly, under this principle all that stands between the shipper and extortion is the wisdom and the good sense of the traffic manager who makes the rates. If, in his judgment, it is advisable to carry a small volume of traffic upon a higher rate, rather than a large volume of traffic upon a low rate, there is nothing to interfere with this decision, and all the consequences affecting the country at large, excepting now the right of appeal to the Government as represented in this Commission.

"Rates being made upon this theory, the function of the traffic manager is that of a statesman; he determines zones of production and consumption, the profits of the producer and the cost to the consumer; he makes his rates, if he so pleases, to offset and nullify the effect of import duties and determine the extent and character of our foreign markets.

"To make rates for transportation based solely upon the ability of the shipper to pay those rates is to make the charge for transportation depend upon the cost of production rather than upon the cost of carriage to measure a public service by the economies practiced by the private shipper. This necessarily gives to the carrier the right to measure the amount of profit which the shipper may make and fix its rate upon the traffic manager's judgment as to what profit he will be permitted. This theory entitles the railroad to enter the books of every enterprise which it serves and raise or lower rates without respect to its own earnings but solely with respect to the earn-

ings of those whose traffic it carries. This is not regulation of railroads by the nation, but regulation of the industries and commerce of the country by its railroads.

"That nothing stands in the way of extortion excepting the fair-mindedness of the railroad traffic manager is illustrated in this case by the examination of the traffic manager of one of the leading roads. He was asked why the present first class rate from Chicago to Kansas City should not be raised from 80 cents to \$2.40, and corresponding increase of 200 per cent made upon all the other class and commodity rates. His first answer was that some of the commodities would not move under such increased rates. Being told to assume that class traffic at such rate would move, his answer was:

"The business conditions have adjusted themselves to the 80-cent rate. It would be a wrench to ask any 300 per cent raise on that 80-cent rate, and having existed on that 80-cent rate, we do not need 300 per cent of that 80-cent rate to continue to exist. We do not want to see any wrench in commercial conditions. We would ask, "Is it decent and fair and proper," and these considerations would appeal to us."

"Being asked, further, to assume that one man owned all of the roads in that territory, could you give any reason why rates should not all be raised to the class basis, or increase them 200 per cent, the traffic manager answered:

"Yes, because the advance would be too great of itself. It would be a shock to my sense of propriety—a shock to my sense of justice."

"And that was the ultimate word. Rates are no higher than they are, not because there is any maximum standard based upon the cost of service or the return to the carrier, but because to increase them would not be 'fair or decent or proper'—in short, would not appeal to the conscience of the traffic manager. And this same witness was unwilling to acknowledge that his judgment of what was proper, reasonable, or just should be subject to review by this Commission or by any other tribunal—a position which may fairly be characterized as a modern extension of the ancient principle of divine right."

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1. In Re Investigation of Advances in Rates by Carriers in Western Trunk Line, Trans-Missouri and Illinois Freight Committee Territories (1911), 20 I. C. C. Rep. 307, 347, et seq.

#### 609-K. COMPARISON OF FREIGHT RATES.

See "*Comparison of freight rates,*" Section 610, post.

#### 609-L. THE PUBLIC IS NOT THE GENERAL MANAGER OF RAILROADS RESPECTING THEIR RATES.

In *Interstate Commerce Commission v. Chicago G. W. Ry. Co.*<sup>1</sup> the United States Supreme Court, per Mr. Justice Brewer, said: "It must be remembered that railroads are the private property of their owners; that while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet, in no proper sense, is the public a general manager. As said in *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144, 172, 42 L. ed. 414, 425, 18 Sup. Ct. Rep. 45, 51 quoting from the opinion in 5 Inters. Com. Rep. 697, 21 C. C. A. 59, 41 U. S. App. 466, 74 Fed. 723:

" 'Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law—free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits.' "

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1. Interstate Commerce Commission v. Chicago G. W. Ry. Co. (1908), 209 U. S. 108, 118, 38 Sup. Ct. Rep. 493, 52 L. Ed. 705, 712.

#### 609-M. LOW RATES FOR LOW-GRADE TRAFFIC.

It is to the interest of the carriers, as well as the public, that their rates be low enough, if not below a remunerative point, to permit the general movement and distribution of those commodities in general demand in large quantities for construction, building, manufacturing and other purposes. Reasonable freedom of such movement and distribution stimulates the growth and development of the country, and thereby promotes all interests. The general prevalence of such lower rates on that character of freight is due to the carriers' usual policy of making rates that will fairly permit the traffic to move, if of such value that it will bear reasonable charges.<sup>1</sup>

In the carriage of great staples, which supply an enormous business, and which in market value and actual cost of transportation are among the cheapest articles of commerce, rates yielding only moderate profit to the carrier are both necessary and justifiable.<sup>2</sup> For example, in the case of grain, it is to the interest of both grain growers and consumers that the rates on that commodity from the grain fields in the West to the points of consumption should be as low as possible;<sup>3</sup> lumber is an inexpensive freight, and only a few other commodities furnish to carriers so large a tonnage; the rates thereon should therefore be relatively low;<sup>4</sup> coal rates are usually highly competitive, and this fact, together with its desirability as traffic, and the large quantities moved, have produced on the average a very low rate;<sup>5</sup> salt is an article which demands and receives low rates;<sup>6</sup> fertilizer is a low-grade traffic, subject to no great risk in transit and requires no special service for its transportation. Its free movement and use is an auxiliary tending to produce and furnish a larger volume of traffic and thus promote the prosperity of the carriers and their patrons, so that considering both commercial and transportation conditions, it is entitled to comparatively low rates;<sup>7</sup> soap is an article used by everybody, and of necessity, therefore, should be transported at a low rate;<sup>8</sup> and for similar reasons pig iron, cement, stone, and various other commodities require and are given relatively low commodity rates.

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1. Colorado Fuel & Iron Co. v. Southern P. Co. (1895), 6 I. C. C. Rep. 488.

2. In Re Food Products Investigation (1890), 4 I. C. C. Rep. 48, 3 I. C. Rep. 93; National Hay Assn. v. Lake Shore & M. S. Ry. Co. (1902), 9 I. C. C. Rep. 264.

3. In Re Alleged Unlawful Rates and Practices in Transportation of Grain (1897), 7 I. C. C. Rep. 240.

4. Central Yellow Pine Assn. v. Illinois C. Rd. Co. (1905), 10 I. C. C. Rep. 505.

5. Denison Light & Power Co. v. Missouri K. & T. Ry. Co. (1904), 10 I. C. C. Rep. 327; Fort Dodge Commercial Club v. Illinois C. Rd. Co. (1909), 16 I. C. C. Rep. 572, 582.
6. Anthony Salt Co. v. Missouri P. Ry. Co. (1892), 5 I. C. C. Rep. 299, 4 I. C. C. Rep. 33.
7. Virginia-Carolina Chemical Co. v. St. Louis S. W. Ry. Co. (1909), 16 I. C. C. Rep. 49, 52; Montgomery Freight Bureau v. Western Ry. Co. of A. (1908), 14 I. C. C. Rep. 150, 152.
8. Procter & Gamble Co. v. Cincinnati H. & D. Ry. Co. (1890), 4 I. C. C. Rep. 87, 3 I. C. Rep. 131.

#### 609-N. LOW RATES FOR CARRIAGE OF LONG-HAUL TRAFFIC.

The necessity for making concessions to *long-haul traffic* in the case of articles whose value, in proportion to bulk or weight, is small, and especially in that of the necessaries of life, which are handled in large quantities, and in the supply of which the most distant countries compete, has long been conceded wherever railroads exist. The household goods of immigrants to the West have been carried for them at very low rates, and the results of their agriculture have afterwards been taken for seaboard and European markets in recognition of the general principle that the traffic must not be charged rates beyond *what it can bear*.<sup>1</sup>

This is a just and sound principle when justly applied; and the country may be said not only to have acquiesced in its recognition, but to have desired and urged its application in a great variety of cases. Any suggestion that it was meant by the statute to abrogate it would scarcely be plausible, especially since, when not misapplied, it can harm no one, but may be, and often is, of great and manifest advantage in enabling distant sections of the country to come into closer commercial relations, and to exchange, to their mutual benefit, their dissimilar products, and to compete with each other in those which are similar. However, there is a plain limit to the application of the principle that property is to be carried at rates it will bear; and the limit is reached when the rates charged are so low that further reduction would necessitate an increase of the charges on other traffic in order to make up to the carrier such loss as the reduction causes.<sup>2</sup>

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1. In Re Southern Railway & Steamship Association (1887), 1 I. C. C. Rep. 31, 1 I. C. Rep. 278.

2. Ibid.

#### 609-O. RATES ESTABLISHED BY CONCERT OF ACTION BETWEEN THE CARRIERS.

In determining an issue of unreasonableness of a rate, the Commission should inquire into the circumstances under which the rate was made.<sup>1</sup> Where rates at a particular point are unduly influenced by an agreement or combination among carriers to suppress competition at that point such fact may properly be considered in determining the question of undue discrimination and the reasonableness *per se* of the rates at such possible competitive point.<sup>2</sup>

While evidence of collusion or concert of action among carriers to increase rates may be pertinent upon the issue of reasonableness, and will be taken into consideration by the Commission;<sup>3</sup> yet evidence of such concert of action is not for that reason alone conclusive of unreasonableness of the rates so increased.<sup>4</sup> Violations of the anti-trust acts are cognizable only in the courts. The Commission in the exercise of its administrative functions must weight other factors and give consideration to the evidence as a whole.<sup>5</sup>

In the case of *Central Yellow Pine Assn. v. Illinois C. Rd. Co.*<sup>6</sup> the Commission said: "We deem it unnecessary to express an opinion as to whether this concert of action in fixing the advanced rate amounts to an unlawful agreement under the so-called 'Anti Trust Act'—the enforcement of that act being a matter properly cognizable by the courts. It is clearly, however, within the scope of our authority and duty to consider this joint or concerted action of the defendants in the aspect of its bearing upon the reasonableness and validity of the advanced rate, the result of that action. Where rates are established by concert of action, and previous understanding between the carriers, it is manifest, whether or not there be a binding agreement to maintain such rates, that the element of competition is eliminated. Concert of action is wholly inconsistent with competition and, during the time the rates fixed by concert of action are maintained, the effect, so far as competition is concerned, is the same as if there was a binding agreement to maintain such rates.

"Competition is favored by the laws. The object of the pooling section (Section 5) of the Interstate Commerce Act is to prevent 'any contract, agreement, or combination' between otherwise competing carriers by which competition between them may be done away with. In *East Tenn., Va. & Ga. Ry Co. v Interstate Commerce Commission*, it is said, 'The Interstate Commerce Law, it is conceded, was intended to encourage normal competition. It forbids pooling for the very purpose of allowing competition to have effect.' (99 Fed. Rep. 61.) The Supreme Court holds that the suppression of competition is violative of the so-called 'Anti-Trust Act,' in that, such suppression restrains trade and commerce by 'keeping rates and charges higher than they might otherwise be under the laws of competition.' (*Joint Traffic Association Case*, 171 U. S. 569, 571, 577, 43 L. ed. 287, 288, 290, 19 Sup. Ct. Rep. 25; *U. S. v. Freight Association*, 166 U. S. 341, 41 L. Ed. 1037, 17 Sup. Ct. Rep. 540.)

"The ground upon which competition is favored is that it conduces to the reasonableness of rates or to the protection of the public from unreasonably high or excessive rates. In *United States v. Freight Association, supra*, the Supreme Court says, 'competition will itself bring charges down to what may be reasonable.' (166 U. S. 339, 41 L. ed. 1027, 17 Sup. Ct. Rep. 540.) The Act to regulate commerce (Section 1), in prohibiting unreasonableness of rates in effect forbids whatever conduces to such unreasonableness. In any event, it is incumbent upon this Commission, when the reasonableness of rates is in issue before it, to consider how those rates were brought about—whether they are the product of untrammeled competition or the result of a concert of action or combination between the carriers establishing and maintaining them. The advanced rates complained of cannot be claimed to be the outcome of competition because 'natural, direct and immediate effect of competition is to lower' (171 U. S. 577, 43 L. ed. 290, 19 Sup. Ct. Rep. 25), rather than advance rates. The advanced rates must be presumed to be higher than rates which unrestrained competition would produce."

The Commission has said that if it finds that the rate was not the product of free competition, but was the result of an agreement, this fact would rob the rate of the presumption of reasonableness which

might otherwise attach, and should be considered by the Commission in determining whether the advance was justifiable;<sup>7</sup> but if, after giving due weight to that and all other circumstances, the Commission is still of the opinion that the rate in effect is not too high, the mere fact that it was the product of an unlawful combination will not justify it in setting such rate aside.<sup>8</sup>

It is highly significant that the advance in question was the result of concerted action of the various roads.<sup>9</sup>

The rate which is advanced as the result of an agreement among carriers even if such agreement be with color of violation of the Anti-Trust Act, will not on that ground alone be declared unreasonable; evidence of such violation is pertinent and must be considered, but the existence of such an unlawful agreement, even when proved, is not conclusive of the unreasonableness of the rate so advanced.<sup>10</sup>

The Commission has held that a rate, the highest which could be maintained in the face of open competition, should not be advanced by agreement or understanding of the carriers when that competition has been put under check, unless some valid reason can be shown for the advance.<sup>11</sup>

See "*Federal Antitrust Laws—Sherman Antitrust Act—Clayton Antitrust Act*," Chapter 43, post.

1. China & Japan Trading Co. v. Georgia Rd. Co. (1907), 12 I. C. C. Rep. 326; In the Matter of Advances in Rates from St. Louis to Texas Points (1905), 11 I. C. C. Rep. 238; Cattle Raisers' Assn. of Texas v. Missouri K. & T. Ry. Co. (1905), 11 I. C. C. Rep. 296; Central Yellow Pine Assn. v. Illinois C. Rd. Co. (1905), 10 I. C. C. Rep. 505; Tift v. Southern Ry. Co. (1905), 10 I. C. C. Rep. 548.
2. Interstate Commerce Commission v. Louisville & N. Rd. Co. (1903), 190 U. S. 273, 47 L. Ed. 1047, 23 Sup. Ct. Rep. 687.
3. Excelsior from St. Paul, Minn. (1915), 36 I. C. C. Rep. 349, 362; citing, Central Yellow Pine Assn. v. Illinois C. Rd. Co. (1905), 10 I. C. C. Rep. 505, and, Tift v. Southern Ry. Co. (1905), 10 I. C. C. Rep. 548.
4. Excelsior from St. Paul, Minn. (1915), 36 I. C. C. Rep. 349, 362; citing, Enterprise Mfg. Co. v. Georgia Rd. Co. (1907), 12 I. C. C. Rep. 451, 455.
5. Excelsior from St. Paul, Minn., *supra*.
6. Central Yellow Pine Assn. v. Illinois C. Rd. Co. (1905), 10 I. C. C. Rep. 505, 540 et seq.; reaffirmed, Tift v. Southern Ry. Co. (1905), 10 I. C. C. Rep. 548, 681. See, also, Warren Mfg. Co. v. Southern Ry. Co. (1907), 12 I. C. C. Rep. 381; Railroad Commission of Texas v. Atchison, T. & S. F. Ry. Co. (1911), 20 I. C. C. Rep. 463, 465.
7. China & Japan Trading Co. v. Georgia Rd. Co. (1907), 12 I. C. C. Rep. 236.
8. *Ibid.*
9. Tift v. Southern Ry. Co. (1905), 138 Fed. Rep. 753; affirmed, Southern Ry. Co. v. Tift (1907), 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. Rep. 709.
10. Enterprise Mfg. Co. v. Georgia Rd. Co. (1907), 12 I. C. C. Rep. 451; Warren Mfg. Co. v. Southern Ry. Co. (1907), 12 I. C. C. Rep. 381; Chicago Lumber & Coal Co. v. Tioga S. E. Ry. Co. (1900), 16 I. C. C. Rep. 323; Board of Major and Aldermen of Bristol v. Virginia & S. W. Ry. Co. (1909), 15 I. C. C. Rep. 453; Kiser v. Central of G. Ry. Co. (1909), 17 I. C. C. Rep. 430, 440; Railroad Commission of Texas v. Atchison, T. & S. F. Ry. Co. (1911), 20 I. C. C. Rep. 463, 465.
11. In Re Proposed Advances in Freight Rates (1903), 9 I. C. C. Rep. 382, 395.

#### 609-P. RATE-PER-TON-PER-MILE TEST OF REASONABLENESS.

The rule that the cost of carriage is usually in the inverse ratio to distance and that therefore the charge per ton per mile should diminish with distance is not a requirement of the statute, and is subject to qualification and exceptions.<sup>1</sup> It is usually applied in connection with continuous carriage over long through routes, but even then special conditions, such as volume of business, character of route and necessary

revenue from the business done so as not to perform the service at the expense of traffic at other points, may materially qualify it.<sup>2</sup> It is not inconsistent with the law, however, for a carrier, within reasonable limits, to accept less per ton per mile upon long hauls than upon short hauls, and widen the disparity between such rates as the difference in distance increases.<sup>3</sup> The rate-per-ton-per-mile rule brings rates to the narrowest points of scrutiny, and for that purpose is valuable, but it excludes consideration of other circumstances and conditions which enter into the making of rates, no matter how compulsory, or imperious they may be, and it cannot, therefore, be accepted as controlling in determining the reasonableness of rates.<sup>4</sup>

Ton-mile statistics reflecting as they do neither car loading, train tonnage, nor car or train mileage, are far from being infallible guides in fixing freight rates. A high average ton-mile revenue may be due to short hauls, a preponderance of which occasions the railroad traffic manager much uneasiness, while it has been repeatedly shown that traffic low in ton-mile earnings, may, because of its farther carriage and greater density, be the most remunerative. Per-car earnings, with distance considered, are much more reliable. Where the commodity moves in trainloads the earnings per train mile furnish the best criterion, not only the car loading but also such physical conditions as grades, etc., being here reflected. Comparisons of any kind, however, to be effective must be analogous, or nearly so; that is, the rate charged or gross earnings derived on any basis for the transportation of a given commodity between two points furnishes a guide in arriving at the rate to be charged upon the same or nearly the same commodity between two other points similarly circumstanced.<sup>5</sup>

The rate-per-ton-per-mile rule is not the generally accepted basis for making rates in this country, so far at least as interstate movements are concerned.<sup>6</sup> The mere comparison of revenue per ton per mile, even when showing higher from given points is not conclusive as applied in a country where nature has interposed such obstacles as to make operating conditions so dissimilar.<sup>7</sup>

The accurate presentation of per-ton-per-mile yield must include a statement which will show the actual hauls and the average length of the hauls.<sup>8</sup> A high average ton-mile revenue may be due to short hauls. It has been repeatedly shown that traffic low in ton-mile earnings may, because of its farther carriage and greater density, be the most remunerative.<sup>9</sup> Upon a short haul the per-ton-mile test has, as a rule, very little evidentiary value.<sup>10</sup> Ordinarily rates for longer distances yield a lower per-ton-mile revenue.<sup>11</sup>

The movement of freight short distances is necessarily by local trains with frequent stops and is much more expensive than movements by through trains over long lines. There are some items of cost such as loading and unloading, which are common to long and short hauls, which make a considerable item in the cost of carrying short distances, but become very slight when apportioned on business over long lines.<sup>12</sup> A local rate covers the expense of two terminals, but a division of a through rate allotted to either of the terminal carriers of the through line can only embrace the expense of one terminal. Because of this difference in expense, among other reasons, local rates are made as a general rule much higher in proportion to the length of haul than through rates of any division thereof.<sup>13</sup>

It is not the purpose of the Act to disregard the principles that longer hauls involve less handling of the property transported than shorter hauls, and that rates per ton per mile for longer hauls may be inadequate for shorter hauls.<sup>14</sup>

Disparity of ton-mile revenue cannot of itself justify condemnation of the rate structure of long standing.<sup>15</sup>

While a comparison based only on ton-mile revenue may often be misleading, the Commission has frequently recognized its value. When a comparison is made between rates on lines which operate under like physical conditions, and when the length of the hauls are substantially equal, the fact that ton-mile revenue of one carrier for the transportation of a commodity greatly exceeds the ton-mile revenue received by other carriers for the transportation of the same commodity is indicative of the unreasonableness of the higher rate.<sup>16</sup>

Ton-mile earnings are not controlling as competition between shippers, cities and railroads may often force and justify departures from a mathematical decrease in ton-mile earnings as the hauls increase.<sup>17</sup>

In *Anaconda Copper Mining Co. v. Director General, Ann Arbor Rd. Co.*<sup>18</sup> the Commission stated: "We have frequently had occasion to comment upon the car-mile and train-mile revenue tests, and they have been found of substantial probative force in many situations. *National Hay Ass'n. v. M. C. R. R. Co.*, 19 I. C. C., 34, 47. *In re Advances on Coal to Lake Ports*, 22 I. C. C., 604, 620. We have also commented upon the limited value of ton-mile revenue comparisons, although of much value in many cases. The process of comparing rates by ton-mile figures is one by which those rates may be brought down to the narrowest point of scrutiny and in this sense the ton-mile test is valuable, but it is only one test and does not take into consideration any of the surrounding circumstances and conditions that enter into the making of the rate, regardless of how compulsory or imperious they may be. *Bus. Men's Asso. of Minn. v. C., St. P., Minn. & O. Ry. Co.*, 2 I. C. C., 52; *Coke Producers Asso. of Connellsburg v. B. & O. R. R. Co.*, 27 I. C. C., 125, 140; *Commercial Club of Omaha v. A. & S. R. Ry. Co.*, 27 I. C. C. 302, 317; *Springston Lumber Co. v. N. P. Ry. Co.*, 50 I. C. C., 591, 594."

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1. Manufacturers and Jobbers Union v. Minneapolis & St. L. Rd. Co. (1890), 4 I. C. C. Rep. 79, 3 I. C. Rep. 115; *Farrar v. Southern Ry. Co.* (1906), 11 I. C. C. Rep. 640; *Mountain Ice Co. v. Delaware, L. & W. Rd. Co.* (1909), 15 I. C. C. Rep. 305, 320; *Ozark Fruit Growers Assn. v. St. Louis & S. F. Rd. Co.* (1909), 16 I. C. C. Rep. 106, 114; *Muskogee Traffic Bureau v. Atchison, T. & S. F. Ry. Co.* (1909), 17 I. C. C. Rep. 169, 173; *Rainey & Rogers v. St. Louis & S. F. Rd. Co.* (1910), 18 I. C. C. Rep. 88, 90; *Receivers & Shippers Assn. of Cincinnati v. Cincinnati, N. O. & T. P. Ry. Co.* (1910), 18 I. C. C. Rep. 440, 466; *National Hay Assn. v. Michigan C. Rd. Co.* (1910), 19 I. C. C. Rep. 34, 47; *In the Matter of the Investigation and Suspension of Advances in Rates by Carriers on Grain, Grain Products, etc.* (1911), 21 I. C. C. Rep. 22, 34; *Elk Cement & Lime Co. v. Baltimore & O. Rd. Co.* (1911), 22 I. C. C. Rep. 84, 88; *MERCHANTS & MFRS' ASSN. OF BALTIMORE V. ATLANTIC C. L. RD. CO.* (1912), 22 I. C. Rep. 467, 569; *In the Matter of the Investigation and Suspension of Advances in Rates for the Transportation of Coal by the Chesapeake & Ohio Ry. Co., Baltimore & O. Rd. Co., Norfolk & W. Rd. Co., The Kanawha & M. Ry. Co. and their Connections* (1912), 22 I. C. C. Rep. 604, 620; *Nebraska State Ry. Commission v. Chicago, B. & Q. Rd. Co.* (1912), 23 I. C. C. Rep. 121, 126; *Southern Illinois Millers' Assn. v. Louisville & N. Rd. Co.* (1912), 23 I. C. C. Rep. 672, 673; *Gottrom Bros. Co. v. Genesee & W. Rd. Co.* (1913), 28 I. C. C. Rep. 38; *Boston Chamber of Commerce v. Atchison, T. & S. F. Ry. Co.* (1913), 28 I. C. C. Rep. 230, 232; *Kansas-Iowa Brick Rates* (1913), 28 I. C. C. Rep. 285, 287; *Brick Rates from Ohio Points to Huntington, W. Va.* (1913), 28 I. C. C. Rep. 292, 295; *Malt Rates to Texas Points* (1914), 30 I. C. C. Rep. 385, 386; *Phoenix Printing Co. v. Missouri, K. & T. Ry. Co.* (1914), 31 I. C. C. Rep. 289,

- 291, 292; Rates on Packing-House Products from Cedar Rapids, Iowa, and Other Points to St. Paul, Minn., Eau Claire, Wis., and Other Points (1914), 31 I. C. C. Rep. 308, 310; Adleta Paper Co. v. Chicago & N. W. Ry. Co. (1914), 31 I. C. C. Rep. 347, 348; Rate Increases in Official Classification Territory (1914), 31 I. C. C. Rep. 351, 373; Empire Coke Co. v. Buffalo & S. Rd. Co. (1914), 31 I. C. C. Rep. 573, 578; Weatherford Chamber of Commerce v. Missouri, K. & T. Ry. Co. (1914), 31 I. C. C. Rep. 665, 668; In the Matter of the Investigation and Suspension of Advances in Rates by Carriers for the Transportation of Hardwood and Other Kinds of Lumber and Articles Manufactured Therefrom, from Points in Arkansas, Louisiana and Other Points to Memphis, Tenn., St. Louis, Mo., and Other Points of Destination (1915), 32 I. C. C. Rep. 521, 529; Class and Commodity Rates to Salt Lake City, Utah, and Other Points (1915), 32 I. C. C. Rep. 551, 556.
2. Manufacturers & Jobbers' Union v. Minneapolis & St. L. Rd. Co. *supra*.
  3. Colorado Fuel & Iron Co. v. Southern P. Co. (1895), 6 I. C. C. Rep. 488.
  4. Business Men's Assn. v. Chicago, St. P. M. & O. Rd. Co. (1888), 2 I. C. Rep. 41, 2 I. C. C. Rep. 52; Justin v. Atchison, T. & S. F. Ry. Co. (1899), 8 I. C. C. Rep. 277; Cedar Hill Coal & Coke Co. v. Colorado & S. Ry. Co. (1909), 16 I. C. C. Rep. 387.
  5. Traffic Bureau of Nashville v. Louisville & N. Rd. Co. (1913), 28 I. C. C. Rep. 533, 535; Beatrice Commercial Club v. Chicago, B. & Q. Rd. Co. (1914), 31 I. C. C. Rep. 173, 177.
  6. Bulte Milling Co. v. Chicago & A. Rd. Co. (1909), 15 I. C. C. Rep. 351.
  7. Grand Junction Mining & Fuel Co. v. Colorado Midland Ry. Co. (1909), 16 I. C. C. Rep. 452, 457.
  8. Lumber Rates from Texas, Louisiana, and Arkansas to Oklahoma and Missouri (1913), 28 I. C. C. Rep. 471, 475.
  9. Traffic Bureau of Nashville v. Louisville & N. Rd. Co. (1913), 28 I. C. C. Rep. 533, 535.
  10. Hammerschmidt & Franzen Co. v. Chicago & N. W. Ry. Co. (1914), 30 I. C. C. Rep. 71, 78.
  11. Brownsville, Tex., Class and Commodity Rates (1914), 30 I. C. C. Rep. 479, 485.
  12. New Orleans Cotton Exchange v. Cincinnati, N. O. & T. P. Ry. Co. (1888), 2 I. C. C. Rep. 375, 2 I. C. Rep. 289.
  13. Board of Trade of Troy v. Alabama M. Ry. Co. (1893), 6 I. C. C. Rep. 1, 23, 4 I. C. Rep. 349.
  14. Interstate Commerce Commission v. Alabama M. Ry. Co. (1895), 69 Fed. Rep. 227, 231. This is known as the Troy Case, the history of which is as follows: Board of Trade of Troy v. Alabama M. Ry. Co. (1893), 6 I. C. C. Rep. 1. Carriers ordered to reduce to a specified amount the existing class rates and rates on cotton and phosphate rock from and to Eastern and Northeastern points, which are higher from the shorter haul to and from Troy, Alabama, than from the longer haul to and from various points, on the ground that the existing rates are in violation of Section 4. Interstate Commerce Commission v. Alabama M. Ry. Co. (1895), 69 Fed. Rep. 227. Commission's order held to be invalid on the ground that water competition and competition between carriers subject to the act justifies existing rate adjustment. Interstate Commerce Commission v. Alabama M. Ry. Co. (1896), 74 Fed. Rep. 715. Commission's order held to be invalid on the ground stated by the Circuit Court. Interstate Commerce Commission v. Alabama M. Ry. Co. (1897), 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. Rep. 45. Commission's order held to be invalid on the ground that there is no violation of Sections 3 and 4 of the Act on account of water competition and competition of carriers subject to the Act, and further on the ground that the Commission is without power to fix rates.
  15. Stuarts Draft Milling Co. v. Southern Ry. Co. (1914), 31 I. C. C. Rep. 623, 627.
  16. Weatherford Chamber of Commerce v. Missouri, K. & T. Ry. Co., 31 I. C. C. Rep. 665, 668.
  17. Decker & Sons v. Director General, as Agent, Minneapolis & St. L. Rd. Co. (1920), 59 I. C. C. Rep. 67, 79, cited in Decker & Sons v. Director General, as Agent, Minneapolis & St. L. Rd. Co. (1922), 68 I. C. C. Rep. 34.
  18. Anaconda Copper Mining Co. v. Director General, Ann Arbor Rd. Co. (1920), 57 I. C. C. Rep. 723, 730.

#### 609-Q. AVERAGE RATE PER TON ON ALL FREIGHT.

While averages are often helpful in determining the proper relationship of rates or the proper basis for their construction dissimilarity of circumstances or conditions may affect the force of these factors.<sup>1</sup>

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1. Victor Mfg. Co. v. Southern Ry. Co. (1911), 21 I. C. C. Rep. 222, 229.

609-R. CARRIERS SERVING UNDEVELOPED TERRITORY ENTITLED TO HIGHER RATES THAN ORDINARILY.

A carrier serving and dependent upon a new and undeveloped territory, and unable to earn any profits for its owners, may charge higher rates than would be reasonable under different conditions.<sup>1</sup>

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1. *Memphis Freight Bureau v. Fort Smith & W. Rd. Co.* (1907), 13 I. C. C. Rep. 1.

609-S. RATES ESTABLISHED TO DEVELOP A PARTICULAR INDUSTRY.

Where a rate has been established and maintained for a considerable period for the purpose of developing a particular industry, and with full knowledge that the industry could not be developed without it, and where, under the influence of such rate, large amounts of money have been invested in property, the value of which must be seriously impaired by an advance in rates, that fact is an important consideration in passing upon the reasonableness of such advance.<sup>1</sup> However, a past rate is no estoppel against an advance.<sup>2</sup>

In *Oregon & Washington Lumber Manufacturers' Assn. v. Southern P. Co.*<sup>3</sup> the Commission said: "It often happens that the very existence of an industry depends upon the rate accorded to it. If, now, a carrier has established a particular rate for the express purpose of enabling an industry to exist, and if, upon the strength of that rate money has been invested which must be destroyed if the rate is withdrawn, it has been our understanding that this fact might properly be considered in passing upon the reasonableness of the proposed change in rate. Such fact is not controlling, but is one of the circumstances which may properly be kept in view. It has been our opinion that we might, in a proper sense, order the continued maintenance of a rate upon which investment of money had been induced, even though we would not in the first instance, as an original proposition, have directed the establishment of that rate."

Investment made in an industrial enterprise in reliance upon an existing rate, cannot act as a bar to the readjustment of the rate structure.<sup>4</sup> Shippers have no interest in a rate by reason of contract or class of investments made under an existing rate, and such fact standing alone could not preclude the raising of an unreasonably low rate.<sup>5</sup> The fact that a new plant was built upon the assurance from the carriers that a lower rate would be established is not in and of itself sufficient ground for finding the rate unreasonable.<sup>6</sup>

The circumstances as to investment by a shipper on the strength that a certain rate will continue is pertinent for the Commission to consider and may be a strong admission upon the part of the carrier that the rate is, on the whole, reasonable, but this fact is merely evidentiary, and there is some doubt as to whether it can be considered at all.<sup>7</sup>

See "*Contracts Between Carriers and Shippers and Others,*" Chapter 15, post.

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1. *Western Oregon Lumber Mfrs. Assn. v. Southern P. Co.* (1908), 14 I. C. C. Rep. 61. Carriers ordered to reduce to a specified amount an advanced rate on green fir lumber from Willamette Valley, Oregon, to San Francisco, Calif., on the ground that

such rate is unreasonable. *Southern P. Co. v. Interstate Commerce Commission* (C. C. N. D. Cal.). Case undecided. Certified to Supreme Court, because trial Court was divided on merits. *Southern P. Co. v. Interstate Commerce Commission* (1909), 215 U. S. 226, 54, L. Ed. 169, 30 Sup. Ct. Rep. 89. Certificate dismissed and case remanded to Circuit Court. *Southern P. Co. v. Interstate Commerce Commission* (1910), 177 Fed. Rep. 963. Commission's order held to be valid. *Southern P. Co. v. Interstate Commerce Commission* (1911), 219 U. S. 433, 55 L. Ed. 283, 31 Sup. Ct. Rep. 288. Commission's order held to be invalid on the ground that it was based upon the assumed power of the Commission to prevent railroad companies from raising their rates on the theory that they were estopped to advance such rates on account of having maintained it for a considerable period. Such power, it was held, has not been conferred upon the Commission.

2. *Southern P. Co. v. Interstate Commerce Commission* (1911), 219 U. S. 433, *supra*.
3. *Oregon & Washington Lumber Mfrs. Assn. v. Southern P. Co.* (1911), 21 I. C. C. Rep. 389, 394. *Southern P. Co. v. Interstate Commerce Commission* (1911), 219 U. S. 433, *supra*, cited and distinguished. See, *Beatrice Creamery Co. v. Illinois C. Rd. Co.* (1909), 15 I. C. C. Rep. 109, 128.
4. *Michigan Upper Peninsula Pig-Iron Rates* (1913), 26 I. C. C. Rep. 284, 285; *Brantley v. Atlantic C. L. Rd. Co.* (1915), 30 I. C. C. Rep. 21, 24.
5. Rates on Crushed Stone from McCook and Thornton, Ill., to Stations in Indiana and Michigan (1914), 29 I. C. C. Rep. 136, 137; Lumber Rates from Local Points on the Alabama Great Southern Rd. to Chattanooga, Tenn. (1914), 29 I. C. C. Rep. 646, 647; *Chattanooga Log Rates* (1914), 30 I. C. C. Rep. 36, 39; *Crawford & Bunce v. Pittsburgh, C. C. & St. L. Ry. Co.* (1914) 32 I. C. C. Rep. 12, 14.
6. *Meridian Fertilizer Factory v. Louisville & N. Rd. Co.* (1914), 30 I. C. C. Rep. 494, 497.
7. *Duluth, Minn. Log Rates* (1914), 29 I. C. C. Rep. 420, 421.

#### 609-T. TONNAGE SHIPPED BY A PARTICULAR FIRM

While the amount shipped by a concern has little or no bearing on the question of the reasonableness of the rates, it is of some significance where the shipments reach substantial proportions.<sup>1</sup>

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1. *Acme Cement Plaster Co. v. Lake Shore & M. S. Ry. Co.* (1909), 17 I. C. C. Rep. 30.

#### 609-U. RATES FIXED ACCORDING TO THE USAGE OF THE COMMODITY, OR “BUSINESS MOTIVE” OF THE SHIPPER ARE UNREASONABLE AND UNLAWFUL.

Tariffs which apply rates upon commodities according to their use or “business motive” of the shipper are improper. The carrier has no right to attempt to dictate the usage to which the commodities transported by it shall be put. The duty of the common carrier is to transport commodities at the tariff rates and on equal conditions for all.<sup>1</sup>

The concurring existence of two separate and distinct rates on the same commodity is condemned when the traffic moves over the same route in the same direction, between the same points, and the carriers, by their published tariffs, assume to charge one rate or the other according to the ultimate use to which the commodity is to be put.<sup>2</sup> The Commission has consistently condemned the maintenance of different rates upon the same commodity depending upon the use to which the article is put.<sup>3</sup>

For example, rates proposed for coal bunker use are made dependent upon the use to which the coal is to be put and are therefore unlawful.<sup>4</sup> Carriers may not concern themselves with reference to the use made of coal.<sup>5</sup> There is no more justification for a lower rate on coal used for fuel on boats than would be on coal used on railroads.<sup>6</sup>

It is now well settled that the Interstate Commerce Commission cannot undertake to determine whether a rate is reasonable or un-

reasonable by ascertaining to what use the product should be and is put.<sup>7</sup>

In the proceeding *In the Matter of Restricted Rates*<sup>8</sup> the Commission held that a tariff providing for reduced rates on coal used for steam purposes, or that the carrier will refund part of the regular tariff charges on presentation of evidence that the coal was so used, is improper and unlawful—that is to say, that the carrier has no right to attempt to dictate the uses to which the commodities transported by it shall be put in order to enjoy a transportation rate; that a carrier or a person or corporation operating a railroad or other transportation and line may not, as a shipper over the lines of another carrier, be given any preference in the application of tariff rates on interstate shipments, but it may lawfully and properly take advantage of legal tariff joint rates applying to a convenient junction or other point on its own line, provided such shipments are consigned through to such points from the point of origin and are, in good faith, sent to such billed destination.

The United States Supreme Court in affirming the above holding of the Commission, in the case of *Interstate Commerce Commission v. Baltimore & O. Rd. Co.*<sup>9</sup> Held: That conditions with respect to competition between coal intended for railway consumption and other coal, and with respect to the manner of delivery, depending upon a difference in the facilities possessed by the railroads and other consignees, do not make the interstate traffic therein dissimilar in circumstances and conditions, within the meaning of the Interstate Commerce Act, section 2 thereof, so as to justify the giving of a lower rate for the transportation of railway fuel coal than is given to shippers of other coal between the same points.

However, the principles that differences in rates should not be predicted solely on the use to which the commodities are put presupposes, of course, like commodities.<sup>10</sup> The final use to which the article is put may determine whether it should be considered finished or unfinished.<sup>11</sup>

See "*Discriminations, Preferences and Advantages,*" Chapter 26, post.

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1. *Fort Smith Freight Bureau v. St. Louis & S. F. Rd. Co.* (1908), 13 I. C. C. Rep. 651; *Duncan v. Atchison, T. & S. F. Ry. Co.* (1893), 6 I. C. C. Rep. 85.
  2. *Ibid.*
  3. *Hardie Mfg. Co. v. Oregon Rd. & Nav. Co.* (1912), 24 I. C. C. Rep. 545, 546; *Memphis Freight Bureau v. St. Louis & S. F. Rd. Co.* (1912), 24 I. C. C. Rep. 602; *Catoosa Limestone Products Co. v. Western & A. Rd. Co.* (1916), 38 I. C. C. Rep. 614, 615.
  4. *Bituminous Coal and Coke Rates from Mines and Ovens in Alabama, Illinois, Kentucky, and Tennessee to Mississippi River Crossings and Various Junction Points in Tennessee, Mississippi, and Louisiana* (1915), 35 I. C. C. Rep. 187, 190.
  5. *Ibid.*
  6. *Ibid.*
  7. *Detroit Coal Co. v. Michigan C. Rd. Co.* (1915), 37 I. C. C. 274, 278, 293.
  8. *In the Matter of Restricted Rates* (1911), 20 I. C. C. Rep. 426. Enforcement of Commission's order temporarily enjoined. *Baltimore & O. Rd. Co. v. United States* (1912) (Commerce Court No. 39. Not reported.) Commission's order held to be valid in all respects. The court, however, recognized the right of the Commerce Court to grant a temporary injunction in the proper case. *Interstate Commerce Commission v. Baltimore & O. Rd. Co.* (1912), 225 U. S. 326, 56 L. Ed. 1107, 32 Sup. Ct. Rep. 742.
  9. *Interstate Commerce Commission v. Baltimore & O. Rd. Co.* (1912), 225 U. S. 326, 56 L. Ed. 1107, 32 Sup. Rep. 742.
  10. *Official Classification Rates on Paper* (1916), 38 I. C. C. Rep. 120, 140.
  11. *Commercial Club, of Salt Lake City, Utah, v. Atchison, T. & S. F. Ry. Co.* (1915), 36 I. C. C. Rep. 86, 107.

**609-V. AGREEMENT BETWEEN CARRIER AND MUNICIPALITY FOR MAINTENANCE OF GIVEN RATE IN CONSIDERATION OF GRANT OF CERTAIN PRIVILEGES TO CARRIER BY CITY, NOT BINDING ON COMMISSION.**

The fact that a carrier subject to the Interstate Commerce Act and the city served by it, have contracted, in consideration of the grant of certain privileges by the city to the carrier, for the maintenance of a definite rate on coal moving in interstate commerce, lower than a rate afterwards established by the carrier in the manner provided by the act, does not authorize the Commission in testing the reasonableness of the latter and higher rate to apply considerations other than those which would generally be applicable.<sup>1</sup>

See "*Contracts between Carriers and Shippers and Others,*" Chapter 15, post.

1. *Cape Girardeau Commercial Club v. Illinois C. Rd. Co.* (1918), 51 I. C. C. Rep. 105.

**609-W. A CARRIER MAY NOT RESTRICT TRAFFIC TO MOVEMENT BETWEEN POINTS ON ITS OWN LINES.**

A carrier may not by rate adjustments reserve territory it serves for plants located on its own lines.<sup>1</sup> A carrier cannot expect wholly to retain traffic from points into which it has first extended its line.<sup>2</sup> Carriers cannot force customers to deal with plants on their own rails by unlawful rate adjustments.<sup>3</sup> A carrier should not be permitted to retain to itself the lumber market at points on its line for the benefit of producing points on its line, to the exclusion of producing points on other lines.<sup>4</sup>

Rates established by a common carrier under a desire to keep upon its line material for which the road itself has use, or to keep the price thereof low for its own advantage, cannot be justified in morals or in law. Every party who produces such a material is entitled to sell it when he wishes, in the best available market, and the common carrier has no right to prevent his doing so by disproportionate or unreasonable rates.<sup>5</sup>

1. *Hughes Creek Coal Co. v. Kanawha & M. Ry. Co.* (1914), 29 I. C. C. Rep. 671, 677; *Oklahoma Portland Cement Co. v. Arkansas, L. & G. Ry. Co.* (1914), 32 I. C. C. Rep. 221, 225.

2. *Omaha Grain Exchange v. Northern P. Ry. Co.* (1914), 30 I. C. C. Rep. 572, 578.

3. *In the Matter of the Investigation and Suspension of Advances in Rates by Carriers for the Transportation of Plaster, Gypsum Rock, Stucco, and Plaster Board from Blue Rapids and Irving, Kas., to Points in Arkansas, Kansas and Missouri* (1913), 27 I. C. C. Rep. 67.

4. *Lumber Rates from Texas, Louisiana, and Arkansas to Oklahoma and Missouri* (1913), 28 I. C. C. Rep. 471, 474.

5. *Reynolds v. Western N. Y. & P. Rd. Co.* (1888), 1 I. C. Rep. 685. 1 I. C. C. Rep. 395. *Low Moor Iron Co. of Virginia v. Chesapeake & O. Ry. Co.* (1914), 30 I. C. C. Rep. 615, 619.

**609-X. EFFECT OF WIDESPREAD RATE ADJUSTMENT.**

Difficulties are always encountered when long established rate relationships are disturbed.<sup>1</sup>

A long standing system of rates ought not to be disturbed without considering the effect upon property interests; but where such rate is unlawful it should be corrected.<sup>2</sup>

A change in one of a series of related rates changes the relation among all of them.<sup>3</sup> The Commission has uniformly sustained the carrier's contention that percentage adjustment between Central Freight Association Territory and the East ought not to be disturbed without strong reasons for so doing.<sup>4</sup>

Local rates in Central Freight Association Territory are built substantially on distance. This adjustment has obtained for many years; commercial interests have grown up thereunder and it has been the subject of less complaint than any other general rate adjustment. Although the Commission has at various times been appealed to to change it, it has declined to do so.<sup>5</sup> Class rates, long in effect forming the basis of a rate fabric, to which business has adjusted itself, are not disturbed upon the mere suggestion that a better scheme might have been originally devised.<sup>6</sup>

The Commission cannot deny relief on the ground that other points similarly situated might therefore be induced to ask for like relief.<sup>7</sup> The Commission would not hesitate to reduce an unreasonable rate because of threats of a reduction from competing fields.<sup>8</sup>

While the Commission ought to consider the general effect upon the revenues of carriers by the establishment of a uniform-distance scale, the mere fact that some particular rate would be somewhat advanced or reduced in comparison with other rates is no valid objection to that course.<sup>9</sup> Justice should not be denied complainant because to grant it will necessitate a change elsewhere. Equality cannot be withheld because it is or will be objected to by other carriers or shippers.<sup>10</sup>

Where rates from various fields in a coal belt are so correlated that to change one may disturb the entire adjustment, the Commission cannot undertake to pass upon the reasonableness of one of the rates involved without considering its relation to the rates from other coal fields.<sup>11</sup> It is the duty of the Commission to consider rates applied over the entire territory likely to be affected by a change in rates to particular points.<sup>12</sup> It is the duty of the Commission to determine the question of relative rates on coal as between competing producing districts upon a basis that will permit them to compete in common markets and under circumstances which their location and conditions of production fairly entitle them with respect of their relation one to the other.<sup>13</sup>

While it is proper to consider the effect of a decision upon the general rate adjustment applying over a wide scope of territory, rates which discriminate against one locality upon a particular road cannot be justified on the ground that they are a part of the general scheme adopted by several roads entering the same territory and supplying coal from different and unassociated districts.<sup>14</sup>

Where a change in rates is demanded, which will apparently throw into confusion an adjustment of rates over a large section of the country and which are not claimed to be unreasonable of themselves, and in respect to which any modification upon one line will result in the general disturbance and friction among a large number of shippers and carriers of the same product, there should be a clear right to relief under some direct supervision of the law in order to justify the Commission in requiring it.<sup>15</sup> Under such circumstances the Commission

will decline to order such reduction until the matter has been fully presented and has received the fullest consideration.<sup>16</sup>

1. Indianapolis Freight Bureau v. Cleveland C. C. & St. L. Ry. Co. (1912), 23 I. C. C. Rep. 195, 203.
2. Albree v. Boston & M. Rd. Co. (1912), 22 I. C. C. Rep. 303, 315.
3. Bolleau v. Pittsburgh & L. E. Rd. Co. (1912), 22 I. C. C. Rep. 640, 654.
4. Schmidt & Sons v. Michigan C. Rd. Co. (1912), 23 I. C. C. Rep. 684, 686.
5. Indianapolis Freight Bureau v. Cleveland C. C. & St. L. Ry. Co. *supra*.
6. In Re Advances In Rates—Eastern Case (1911), 20 I. C. C. Rep. 243, 306.
7. Chamber of Commerce of Newport News v. Southern Ry. Co. (1912), 23 I. C. C. Rep. 345, 356.
8. Bituminous Coal Operators of Central Pennsylvania v. Pennsylvania Rd. Co. (1912), 23 I. C. C. Rep. 385, 391.
9. Florida Fruit & Vegetable Shippers' Protective Assn. v. Atlantic C. L. Rd. Co. (1911), 22 I. C. C. Rep. 11, 16.
10. Milburn Wagon Co. v. Lake Shore & M. S. Ry. Co. (1911), 22 I. C. C. Rep. 93, 100.
11. Victor Mfg. Co. v. Southern Ry. Co. (1911), 21 I. C. C. Rep. 222, 286.
12. Corporation Commission of the State of North Carolina v. Norfolk & W. Ry. Co. (1910), 19 I. C. C. Rep. 303, 309, et seq.
13. Black Mountain Coal Land Co. v. Southern Ry. Co. (1909), 15 I. C. C. Rep. 286, 294.
14. *Ibid.*
15. Rend v. Chicago & N. W. Rd. Co. (1889), 2 I. C. Rep. 313, 2 I. C. C. Rep. 540; Rice v. Western N. Y. & P. Rd. Co. (1888), 2 I. C. Rep. 298, 2 I. C. C. Rep. 389; Freight Bureau of Cincinnati v. Cincinnati, N. O. & T. P. Ry. Co. (1897), 7 I. C. C. Rep. 180.
16. Dallas Freight Bureau v. Missouri K. & T. Ry. Co. (1907), 12 I. C. C. Rep. 427.

#### 609-Y. ESTABLISHMENT OF LOW RATES BY A CARRIER TO TEST THE TRAFFIC SITUATION.

It not infrequently happens that a carrier having rates in effect that it regards as proper and reasonable rates desires, nevertheless, to test the traffic situation by putting in lower rates, and finding that the results anticipated are not realized under the experimental rates it later wishes to restore the former basis. It is to the best interest alike of the carrier and the shipper that traffic officials may pursue such experiments freely without being met by a suspension order when they seek under such circumstances to restore the former rates. An apprehension on their part that the Commission will always seize such opportunities to keep the rates on the lower basis will naturally tend to a reluctance on the part of rate officials to make tests for that purpose and will introduce a highly undesirable rigidity into our general rate structures. In dealing with suspension matters the Commission has therefore endeavored to be discriminating in cases of that kind.<sup>1</sup>

1. In the Matter of the Investigation and Suspension of Advances in Rates by Carriers for the Transportation of Plaster, Gypsum Rock, Stucco, and Plaster Board from Blue Rapids and Irving, Kas., to Points in Arkansas, Kansas and Missouri (1913), 27 I. C. C. Rep. 67.

#### 609-Z. EQUALIZING RATES OF DIFFERENT CARRIERS.

There is no provision in law requiring that rates shall be the same over all lines between the same points. A carrier with a long route is not obliged, as a matter of law, to meet the rates of a short-line competitor.<sup>1</sup> Neither is a carrier via a long route obliged as a matter of law, to reduce its rate because its short-line competitor reduces a rate which has been the same via both routes.<sup>2</sup>

A carrier is free to fix its rates without reference to those of other carriers competing for business from the same or different points of supply.<sup>3</sup>

A rate is not unreasonable simply because a lower rate is in effect via the lines of other carriers.<sup>4</sup> The existence of a lower rate by the short line, while having some bearing, does not of itself indicate the unreasonableness of a higher rate by the route actually used.<sup>5</sup> The carriers in the through route over which the traffic moves would be guilty of a penal offense under the statute, if they should rebate the difference between their published rate for the longer haul and the published rate of other carriers over the shorter route.<sup>6</sup>

Whatever may have been the practice in the past of "meeting the rate," the Act, and the decisions of the Commission interpreting its provisions, unmistakably lay down the doctrine that tariffs must now be adhered to.<sup>7</sup>

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1. Commercial Coal Co. v. Baltimore & O. Rd. Co. (1909), 15 I. C. C. Rep 11; Johnson v. St. Louis & S. F. Rd. Co. (1907), 12 I. C. C. Rep. 73.
  2. *Ibid.*
  3. Allen & Lewis v. Oregon Rd. & Nav Co. (1899), 98 Fed. Rep. 16; Allen & Lewis v. Oregon Rd. & Nav. Co. (1901), 106 Fed. Rep. 286.
  4. South Cañon Coal Co. v. Colorado & S. Ry. Co. (1909), 17 I. C. C. Rep. 286.
  5. Markley & Son v. Norfolk & W. Ry. Co. (1906), 11 I. C. C. Rep. 616.
  6. *Ibid.*
  7. Menefee Lumber Co. v. Texas & P. Ry. Co. (1909), 15 I. C. C. Rep. 49.

#### 609-AA. RATES VIA CIRCUITOUS ROUTES.

Generally speaking, shippers are entitled to a reasonable charge by the direct line of transportation, and an unreasonable rate by the direct line cannot be allowed for the purpose of permitting a circuitous line to engage in the business at a reasonable profit.<sup>1</sup>

The short line with two or more line hauls may meet the rate by the long line and decline to establish a joint through rate by the short line, unless the line is so circuitous as to be unreasonably long within the definition of Section 15.<sup>2</sup>

Where joint through rates over a circuitous route are cancelled, though a shipper may still reach points of destination by a short line at the same rate, he may still suffer from the fact that under the cancellation he loses the advantage of delivery upon a particular line.<sup>3</sup>

Carriers whose mileage exceeds that of the short line by not less than 15 per cent should be granted authority to meet the rates of the short line.<sup>4</sup>

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1. Grain Rates in Central Freight Association Territory (1913), 28 I. C. C. Rep. 549, 558.
  2. Iowa State Board of Railroad Commissioners v. Arizona E. Rd. Co. (1913), 28 I. C. C. Rep. 563, 567.
  3. Cement Rates from Mason City, Iowa (1914), 30 I. C. C. Rep. 426, 428.
  4. In the Matter of Rates on Tropical Fruits from Gulf Ports to Various Destinations (1914), 30 I. C. C. Rep. 621, 622.

#### 609-BB. THE RIGHT OF A CARRIER TO RESERVE TO ITSELF THE LONG HAUL IN THE ESTABLISHMENT OF A THROUGH ROUTE.

Section 15 (4) of the Interstate Commerce Act (*as amended June 18, 1910, and February 28, 1920*), provides that in establishing through routes the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require any carrier

by railroad, without its consent, embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established.<sup>1</sup>

As a matter of every day fairness a carrier should not be needlessly deprived of traffic which it originates.<sup>2</sup> The long haul is generally conceded to the originating line.<sup>3</sup>

The right of a carrier to maintain for itself the long haul on traffic which it originates is well established.<sup>4</sup> It is the long haul that ordinarily yields the carrier the best profits, and traffic involving a long haul over its own rails is usually highly desirable.<sup>5</sup> Inasmuch as a carrier may so construct tariffs as to hold traffic to its own line, *so long as the Act is not violated*, or may in its own interest carry for longer distance over its own line than would be necessary over the line of its competitor, as the end and the resulting rate in each instance is the same, it may refrain from carrying the longer distance when to do so compels it to accept a less satisfactory division of the rate.<sup>6</sup> The Commission has no right to deprive the originating carrier of its long haul.<sup>7</sup>

The right of a carrier to get the long haul out of traffic which it originates is subordinate to the public interest.<sup>8</sup> A carrier cannot reserve to itself the long haul if to do so works to the detriment of shippers.<sup>9</sup> If a railroad has traffic in its possession it shall be allowed to handle it by its own line as far as it can unless the public interest will suffer thereby.<sup>10</sup>

See "*Right of a carrier to the long haul in the establishment of a through route,*" Section 1100-E, post, and "*Commission may not require carrier to embrace substantially less than entire length of railroad in establishment of through routes,*" Section 1109-B, post.

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1. Section 15 (4) of the Act contains the following proviso governing the establishment of temporary through routes in emergencies: "That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interstate carrier or carriers, and with or without notice, hearing, or the making or filing of a report, and according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."
  2. Toledo Produce Exchange v. Ann Arbor Rd. Co. (1913), 27 I. C. C. Rep. 536, 543.
  3. Salt Rates from Wisconsin to Iowa, etc. (1913), 27 I. C. C. Rep. 526, 529.
  4. Wheeler Lumber Bridge & Supply Co. v. Atchison, T. & S. F. Ry. Co. (1914), 30 I. C. C. Rep. 343, 344.
  5. In the matter of the Investigation and Suspension of Advances in Rates by Carriers for the Transportation of Coal from the Walsenburg District of Colorado to Stations in Kansas, Oklahoma, and Texas (1913), 26 I. C. C. Rep. 85, 88; Sheridan Chamber of Commerce v. Chicago B. & Q. Rd. Co. (1913), 26 I. C. C. Rep. 638, 648.
  6. In the Matter of the Investigation and Suspension of Advances in Rates by Carriers for the Transportation of Grain, Grain Products, and Seed between Aberdeen, S. Dak., and Other Points, and Duluth, Minn., and Other Points, via Chicago, St. P. M. & O. Line (1913), 26 I. C. C. Rep. 595, 598.
  7. Lumber Rates from Oregon and Washington to Eastern Points (1914), 29 I. C. C. Rep. 609, 612.
  8. Toledo Produce Exchange v. Ann Arbor Rd. Co. (1913), 27 I. C. C. Rep. 536, 543.
  9. Paducah Board of Trade v. Illinois C. Rd. Co. (1914), 29 I. C. C. Rep. 583, 591.
  10. Marble Rates from Vermont Points (1914), 29 I. C. C. Rep. 607, 608.

609-CC. HIGHER RATE OVER ROUTE COMPOSED OF TWO OR MORE CARRIERS THAN OVER A SINGLE LINE.

It has long been established and recognized as just and reasonable, to allow two or more roads making up a through line to charge somewhat more than the through transportation, the earnings on which must be divided among all, than would be deemed reasonable and sufficient for transportation if performed wholly by a single road.<sup>1</sup>

A *mileage* scale of rates ordinarily yields a much higher rate in proportion for a short haul than for the long one; and when two short hauls are combined it is usually unjust to require the two carriers to accept compensation at the rate per mile applied for the entire long haul. To a degree they are entitled to a higher rate in consideration of the fact that their individual hauls are short.<sup>2</sup>

The fact that transportation involves the two-line haul is of itself a reason for a somewhat higher charge than if the services were entirely over a single line.<sup>3</sup>

A commodity rate to one point over one line affords no basis of comparison with a higher class rate to a longer distance point over two lines.<sup>4</sup>

A one-line haul is no measure of reasonableness, standing alone, of a higher rate over the route consisting of two lines.<sup>5</sup>

If one carrier voluntarily gives a very low rate per ton per mile over a long and circuitous route in order to handle traffic entirely over its own line this affords no standard of the reasonableness of a rate on other traffic which passes over two or more separately owned lines of railroad.<sup>6</sup>

In *Sheridan Chamber of Commerce v. Chicago B. & Q. Rd. Co.*,<sup>7</sup> the Commission said: "Each carrier participating in a two-line haul will find that operating expenses for its portion of that haul are less than they would be if only a one-line haul to the junction point were involved, and instead of either delivering the car or receiving it from a connecting carrier, it were necessary to deliver it to the consignee or receive it from the consignor. The one-line haul involves two distinct terminal services. Each carrier's share of a two-line haul involves two distinct terminal services, plus the switching movement from one line to the other. In large cities, where the terminal of one carrier is far removed from that of the other, switching from one to the other often involves much greater expenditure than the terminal service of delivering to consignee or receiving from consignor at that station. But where the physical connection between connecting carriers is as simple as in these small western towns, involving no expensive terminal service, the additional cost due to the switching movement is very small, so small, in fact, that it may not properly be made the basis of an additional charge for a two-line haul of substantial length."

The existence of lower rates over routes other than a particular route of movement and the subsequent reduction of the rate over the particular route is not sufficient to establish the unreasonableness of the previous rate.<sup>8</sup>

1. *Loup Creek Colliery Co. v. Virginian Ry. Co.* (1907), 12 I. C. C. Rep. 471; *Sheridan Chamber of Commerce v. Chicago B. & Q. Rd. Co.* (1913), 26 I. C. C. Rep. 638, 647; *Maricopa County Commercial Club v. Southern P. Co.* (1912), 22 I. C. C. Rep. 429,

- 431; Washington Milling Co. v. Norfolk & W. Ry. Co. (1913), 27 I. C. C. Rep. 546, 547; American National Live Stock Assn. v. Southern P. Co. (1913), 26 I. C. C. Rep. 37, 41; In the Matter of the Investigation and Suspension of Advances in Rates by Carriers for Transportation of Coal from the Walsenburg District of Colorado to Stations in Kansas, Oklahoma, and Texas (1913), 26 I. C. C. Rep. 85, 89; Consolidated Fuel Co. v. Atchison, T. & S. F. Ry. Co. (1912), 24 I. C. C. Rep. 213, 215; Wichita Board of Trade v. Atchison, T. & S. F. Ry. Co. (1913), 25 I. C. C. Rep. 625, 633; Wharton Steel Co. v. Delaware L. & W. Rd. Co. (1912), 25 I. C. C. Rep. 303, 308; Baker Commercial Club v. Oregon-Washington Rd. & Nav. Co. (1912), 25 I. C. C. Rep. 281, 283; State of Iowa v. Atchison, T. & S. F. Ry. Co. (1913), 28 I. C. C. Rep. 47, 59; Boston Chamber of Commerce v. Atchison, T. & S. F. Ry. Co. (1913), 28 I. C. C. Rep. 230, 232; Sheridan Chamber of Commerce v. Chicago B. & Q. Rd. Co. (1913), 28 I. C. C. Rep. 250, 264; Waverly Oil Works v. Pennsylvania Rd. Co. (1913), 28 I. C. C. Rep. 621, 631; Iowa State Board of Railroad Commissioners v. Arizona E. Rd. Co. (1913), 28 I. C. C. Rep. 563, 567; Weatherford Chamber of Commerce v. Missouri, K. & T. Ry. Co. (1914), 31 I. C. C. Rep. 665, 666; Meridian Fertilizer Factory v. Abilene & S. Ry. Co. (1915), 33 I. C. C. Rep. 160, 163.
2. In Re Investigation of Alleged Unreasonable Rates on Meat (1912), 23 I. C. C. Rep. 656, 661.
  3. Ontario Iron Ore Co. v. New York C. & H. R. Rd. Co. (1911), 21 I. C. C. Rep. 204, 206. The Commission has held that a rate for a two-line haul from the producing points of live stock to the packing houses may properly be  $2\frac{1}{2}$  cents per 100 pounds higher than for a one-line haul. In Re Investigation of Rates on Meat (1911), 22 I. C. C. Rep. 160, 165.
  4. Wells-Higman Co. v. St. Louis, I. M. & S. Ry. Co. (1910), 18 I. C. C. 175, 176.
  5. Snyder-Malone-Donahue Co. v. Chicago B. & Q. Rd. Co. (1910), 18 I. C. C. Rep. 498.
  6. Cedar Hill Coal & Coke Co. v. Colorado & S. Ry. Co. (1910), 17 I. C. C. Rep. 479, 485.
  7. Sheridan Chamber of Commerce v. Chicago B. & Q. Rd. Co. (1913), 26 I. C. C. 638, 649; affirmed, Sheridan Chamber of Commerce v. Chicago B. & Q. Rd. Co. (1913), 28 I. C. C. 250, 264; Omaha Grain Exchange v. Northern P. Ry. Co. (1914), 30 I. C. C. Rep. 572, 576; Hughes Creek Coal Co. v. Kanawha & M. Ry. Co. (1914), 29 I. C. C. Rep. 671, 678; Hughes Creek Coal Co. v. Kanawha & M. Ry. Co. (1914), 31 I. C. C. Rep. 10, 13; Stonega Coke & Coal Co. v. Louisville & N. Rd. Co. (1916), 39 I. C. C. Rep. 523, 551; Seaboard By-Product Coke Co. v. Director General, as Agent, Delaware L. & W. Rd. Co. (1921), 62 I. C. C. Rep. 317, 325.
  8. Abel & Roberts v. Missouri P. Ry. Co. (1916), 37 I. C. C. Rep. 712; citing, Tallahatchie Lumber Co. v. Yazoo & M. V. Rd. Co. (1916), 38 I. C. C. Rep. 501, 502.

#### 609-DD. REASONABLENESS OF RATE BETWEEN TWO POINTS SERVED BY MORE THAN ONE CARRIER NOT TO BE DETERMINED BY RATE OF LINE MOST FAVORABLY SITUATED.

In *Western Rate Advance Case of 1915*<sup>1</sup> the Commission stated: "We have been confronted on several occasions with the question of setting rates upon a particular description of traffic where the same rates if carried by all the roads would result in essentially different earnings to the different carriers. In *City of Spokane v. Northern Pacific Ry. Co.*, 15 I. C. C. 376, 393-394, we said:

"There is a wide difference between a water system which supplies a single community and a railroad which is part of a commercial and industrial whole supplying many communities. The city of Spokane could not develop if served by the Great Northern Railway alone; nor can we look wholly to the interest of Spokane. The whole territory served by these defendant lines must be considered and the existence of all these railroads to that territory is absolutely essential. These railroads cannot exist unless rates are established which will yield a fair return upon their property. We must, therefore, in fixing these rates, have regard not altogether to any one particular railroad, but to the whole situation, and must consider the effect of whatever order we make upon all these defendants. Such was the opinion formerly expressed by this Commission *In re Proposed Advances in Freight Rates*, 9 I. C. C., 382, and to that opinion we adhere."

"In *Kindel v. N. Y. N. H. & H. R. R. Co.*, 15 I. C. C., 555, 561, this was reiterated:

"In the *Spokane case*, 15 I. C. C., 376, we held that the reasonableness of a rate between two points served by two or more carriers could not be determined by consideration alone of that line which is shortest and most favorably situated as to operations, earnings, etc., but that the entire situation must be considered."

"And again in the same case, at page 563:

"As already suggested, we cannot in determining a competitive rate select that railroad which is the shortest or the most advantageously situated and limit the rate

to what would allow that property fair earnings. We must consider this entire situation and determine a reasonable rate, not merely with reference to the Union Pacific, but with reference to all lines serving these Colorado common points via reasonably direct lines.'

"In *Advances in Rates—Eastern case*, 20 I. C. C., 243, 274, we said:

"In 9 I. C. C., 382, this Commission considered the justice of certain advances in grain rates between Chicago and the Atlantic seaboard, and it there held that whatever rate might reasonably be imposed upon these three systems must be held to be a reasonable charge for that service by all lines. We hold to the same view in this investigation. We do not mean that other lines should not be considered, but that these systems may be taken as typical. Under rates reasonable for these three systems there may be lines whose earnings will be extravagant, but that is their good fortune. There may be lines which cannot make sufficient earnings, but that is their misfortune. We ought not to impose upon this territory, for the purpose of allowing these defendants additional revenues, higher rates than are adequate to these three systems considered as a whole."

"In *Newport Mining Co. v. C. & N. W. Ry. Co.*, 33 I. C. C., 645, 656, we said:

"The rate here under consideration is a blanket rate applicable via the lines of several carriers of different financial condition. While the position of the Northwestern appears to be favorable, and while it appears from the record that its revenues meet all its operating needs and more, yet the situation with respect to the St. Paul is far less satisfactory, as is also that of the Soo and the South Shore. The reasonableness of a rate in a locality served by several carriers will not be determined alone by consideration of that line most favorably situated with respect to operations, traffic, and earnings, and conversely this is equally true, namely, that consideration of the line of poorest traffic, earnings, etc., will not control."

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1. Rate Increases in Western Classification Territory (1915), 35 I. C. C. Rep. 497, 560.

#### 609-EE. REASONABLENESS OF A THROUGH RATE COMPOSED OF THE AGGREGATE OF INTERMEDIATE RATES.

The mere fact that through rates are composed of the aggregate of intermediate rates is not sufficient to condemn them, without proof that such an adjustment results in through rates which are unreasonable or otherwise in violation of the law.<sup>1</sup>

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1. *Western Pine Manufacturers Assn. v. Cincinnati I. & W. Rd. Co.* (1917), 46 I. C. C. Rep. 650, 655; citing, *Appalachia Lumber Co. v. Louisville & N. Rd. Co.* (1912), 25 I. C. C. Rep. 193; *Southeastern Lumber* (1917), 42 I. C. C. Rep. 548, 558; *Connor Lumber & Land Co. v. Great N. Ry. Co.* (1917), 43 I. C. C. Rep. 243.

#### 609-FF. A JOINT THROUGH INTERSTATE RATE WHICH EXCEEDS THE AGGREGATE OF THE INERMEDIATE RATES, SUBJECT TO THE ACT, IS UNLAWFUL AND NON-ENFORCEABLE.

The fourth section of the Interstate Commerce Act (*amended June 18, 1910*) provides as follows:

That it shall be unlawful for any common carrier subject to the provisions of the Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of a like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shortest being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: Provided, however, That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: \* \* \*

Prior to the amendment of June 18, 1910, the Interstate Commerce Commission has consistently held that a joint through rate exceeding the aggregate of the intermediate rates over the same line and in the same direction was *prima facie* unreasonable and the burden

of proof was upon the common carrier to defend the reasonableness of such a rate.<sup>1</sup> There are a few cases of record where the carriers have been able to justify such an abnormal rate. If anything, the joint through rate should be less than the combination of intermediate or local rates upon the theory that as the distance increases the rate per ton per mile decreases.

Congress, undoubtedly, recognized the unreasonableness and unjustice of a joint through rate exceeding the aggregate of intermediate rates when it amended the fourth section of June 18, 1910, and declared such higher joint through rate to be unlawful. The thing that the statute inhibits is *the charging by common carriers subject to the provisions of the Act of a greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of the Act.* We, therefore, have the clear and unmistakable rule that *a joint through interstate rate may be as high as, or lower than the aggregate of the lowest available rates for interstate transportation, but not higher than such combination.* Such higher joint through rate cannot be lawfully established, and if it is published and filed with the Commission it is a vain thing and void *ab initio*. Such higher rate may not be lawfully assessed by the carrier, and if it is used, the charge amounts to a straight overcharge which may be recovered by the shipper in the courts without reference to a prior action by the Interstate Commerce Commission.

Since the amendment of June 18, 1910, the Interstate Commerce Commission has strictly adhered to the policy pursued by it prior to such date with reference to such rate situation, and has held such higher joint through rate *prima facie* unreasonable, and has granted reparation accordingly.<sup>2</sup>

Under a power, clearly assumed but not granted to it, the Commission entertains applications of carriers for the relief of the operation of the aggregate-of-intermediate-rates rule of the fourth section of the Act. There is no warrant in law for the assumption of such authority as the amendment of June 18, 1910, vests no discretionary power in the Commission over such rates, but declares absolutely and unqualifiedly against them.

This entire subject is fully treated under Chapter 7 of this work under Section 705-J, "*Power of the Commission under the aggregate-of-intermediate-rates rule,*" and Section 711-B, "*Legal status of a joint through rate that is higher than the aggregate of the intermediate rates subject to the provisions of the Act.*"

However, in giving consideration to this item it should be noted that this proposition of law has not been judicially established, and until passed upon by a court of competent jurisdiction, shippers should operate under the administrative rulings of the Interstate Commerce Commission as herein set forth, unless it be desired to make a test case of the proposition.

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1. *Hope Cotton Oil Co. v. Texas & P. Ry. Co.* (1905), 10 I. C. C. Rep. 696; *Lindsay Bros. v. Baltimore & O. Rd. Co.* (1919), 16 I. C. C. Rep. 6; *Montgomery Freight Bureau v. Western Ry. of A.* (1908), 14 I. C. C. Rep. 150; *Railroad and Warehouse Commissioners v. Eureka Springs Ry. Co.* (1895), 7 I. C. C. Rep. 17; *Coffeyville Vitrified Brick & Tile Co. v. St. Louis & S. F. Rd. Co.* (1907), 12 I. C. C. Rep. 498; *Morgan v. Missouri K. & T. Ry. Co.* (1907), 12 I. C. C. Rep. 525; *Hardenberg, Dolson & Gray v. Northern P. Ry. Co.* (1907), 14 I. C. C. Rep. 579; *Tariff Circular 18-A.*

- Rule 56; Michigan Buggy Co. v. Grand Rapids & I. Ry. Co. (1909), 15 I. C. C. Rep. 299; Lull Carriage Co. v. Chicago K. & S. Ry. Co. (1910), 19 I. C. C. Rep. 15; Conf. Rul. Bul. Rule 298 (November 14, 1910); Note to Rule 5, Tariff Circular 18-A; Appalachia Lumber Co. v. Louisville & N. Rd. Co. (1912), 25 I. C. C. Rep. 193, 194; Jubitz v. Southern P. Co. (1913), 27 I. C. C. Rep. 44, 45, 46; Pulp & Paper Manufacturers' Traffic Assn. v. Chicago, M. & St. P. Ry. Co. (1913), 27 I. C. C. Rep. 83, 96; Washington Milling Co. v. Norfolk & W. Ry. Co. (1913), 27 I. C. C. Rep. 546, 547; State of Iowa v. Chicago St. P. M. & O. Ry. Co. (1913), 28 I. C. C. Rep. 64, 75; Boston Chamber of Commerce v. Atchison, T. & S. F. Ry. Co. (1913), 28 I. C. C. Rep. 230, 232; Corporation Commission of Oklahoma v. Atchison, T. & S. F. Ry. Co. (1914), 31 I. C. C. Rep. 532, 533; Godwin v. Yazoo & M. V. Rd. Co. (1914), 31 I. C. C. Rep. 25, 27; Board of Trade of Kansas City v. Chicago M. & St. P. Ry. Co. (1915), 34 I. C. C. Rep. 208, 209; Spartanburg Chamber of Commerce v. Southern Ry. Co. (1915), 34 I. C. C. Rep. 484; Standard Lumber Co. v. South Georgia Ry. Co. (1916), 38 I. C. C. Rep. 301, 303; In Re Through Rates to Louisiana and Texas (1916), 38 I. C. C. Rep. 153, 164; Joseph Iron Co. v. Morgan's L. & T. Rd. and S. S. Co. (1916), 40 I. C. C. Rep. 525; Windsor Turned Goods Co. v. Chesapeake & O. Ry. Co. (1910), 18 I. C. C. Rep. 162; Great N. Ry. Co. v. Loonau Lumber Co. (S. D. 1910), 123 N. W. 644, 646.
2. Orange Rice Milling Co. v. Director General, Texas & N. E. Rd. Co. (1919), 55 I. C. C. Rep. 19; Partridge Lumber Co. v. Director General, Chicago, St. P. M. & O. Ry. Co. (1919), 55 I. C. C. Rep. 29; Peoria Board of Trade v. Atchison, T. & S. F. Ry. Co. (1919), 55 I. C. C. Rep. 42, 50; Inman-Poulson Lumber Co. v. Southern P. Co. (1919), 55 I. C. C. Rep. 357, 360; Keet & Roundtree Dry Goods Co. v. Director General, Baltimore S. P. Co. (1919), 55 I. C. C. Rep. 400; Rio Grande Valley Creamery Co. v. Wells Fargo & Co. (1919), 55 I. C. C. Rep. 425; Anderson Lumber Co. v. Director General, Chicago & N. W. Ry. Co. (1919), 55 I. C. C. Rep. 467; Curtis, Booth & Bentley Co. v. Director General, St. Louis S. F. Ry. Co. (1919), 55 I. C. C. Rep. 511, 512, 513; Waccamaw Lumber Co. v. Atlantic C. L. Rd. Co. (1919), 55 I. C. C. Rep. 595; Chevrolet Motor Co. of Texas v. Director General, Atchison T. & S. F. Ry. Co. (1919), 55 I. C. C. Rep. 601; Hechtman v. Director General, Chicago B. & Q. Rd. Co. (1919), 55 I. C. C. Rep. 672; Du Pont De Nemour & Co. v. Director General New York, P. & N. Rd. Co. (1919), 56 I. C. C. Rep. 233; Heider Mfg. Co. v. Baltimore & O. Rd. Co. (1920), 58 I. C. C. Rep. 184; United Paperboard Co. Inc., v. Louisiana W. Rd. Co. (1920), 59 I. C. C. Rep. 151; Gulf Refining Co. of Louisiana v. Toledo, St. L. & W. Rd. Co. (1920), 59 I. C. C. Rep. 154, 155; Ohio Cities Gas Co. v. Director General, as Agent, Chesapeake & O. Ry. Co. (1920), 59 I. C. C. Rep. 320; Cohen-Schwartz Rail & Steel Co. v. Director General, Morgan's L. & T. Rd. & S. S. Co. (1920), 59 I. C. C. Rep. 533; Phelps Dodge Corp. v. Director General, as Agent, Arizona E. Rd. Co. (1920), 59 I. C. C. Rep. 561; Decker & Sons v. Director General, Minneapolis & St. L. Rd. Co. (1920), 50 I. C. C. Rep. 585; Birmingham Rail & Locomotive Co. v. Southern Ry. Co. (1920), 59 I. C. C. Rep. 602; Choctaw Cotton Oil Co. v. Director General, as Agent, Yazoo & M. V. Rd. Co. (1920), 59 I. C. C. Rep. 725; Intermediate Rate Association v. Director General, Aberdeen & R. Rd. Co. (1921), 61 I. C. C. Rep. 226, 246.

#### 609-GG. UNREASONABLENESS OF A JOINT THROUGH RATE THAT EXCEEDS THE COMBINATION OF A LOCAL RATE AND AN undefined PROPORTIONAL RATE.

In the case of *Joseph Iron Co. v. Morgan's L. & T. Rd. & S. S. Co.*,<sup>1</sup> a rate of 30 cents per 100 pounds was charged on certain shipments of scrap iron from Houston, Texas, to Chicago, Ill., via New Orleans, La., in connection with the Morgans L. & T. Rd. & S. S. Co. and Illinois C. Rd. Co. There was contemporaneously in effect a proportional rate of 9½ cents per 100 pounds from Houston to New Orleans "when destined to points beyond to which no through rates are published," and a rate of \$3.31 per net ton from New Orleans to Chicago. The rate charged exceeded the combination rate by 79 cents per ton. The Commission held as follows: "We hold that the 9½ cent proportional rate was not so restricted or limited as to make it inapplicable as a factor in constructing a through rate to Chicago had there been no joint rate in effect. We find upon consideration of all the facts that the joint through rate of 30 cents per 100 pounds was unreasonable to the extent that it exceeded the combination of intermediate rates concurrently in effect, i. e., \$5.21 per ton. No order fixing a specific rate for the future will be made at this time, but the application for authority to continue to charge higher through rates from Houston, through New Orleans, to Chicago, than the aggregate

of the intermediate rates contemporaneously in effect via defendants' lines through New Orleans will be denied. We further find that complainant made the shipments in question and paid charges thereon at the rate therein found to have been unreasonable, that it was damaged to the extent of the difference between the amounts paid and the amounts that would have accrued had the rate which it is herein found to have been reasonable been in effect, and that it is therefore entitled to an award of reparation in the sum of \$682.34, which includes an overcharge of 30 cents, with interest from December 6, 1912."

Upon rehearing of the case the Commission adhered to the conclusions reached in the original report and stated: "In *Windsor Turned Goods Co. v. C. & O. Ry. Co.*, 18 I. C. C., 162, we dealt with an analogous situation, and said:

"The fair measure of the reasonableness of a joint through rate that exceeds the combination between the same points via the same route is and will hereafter be held to be the lowest combination that would lawfully apply if the joint through rate were canceled."

"That rule is affirmed and it applies in the instant case. We adhere to our previous decision, and will accordingly reenter the order for reparation."<sup>2</sup>

In *Morgan's L. & T. Rd. & S. S. Co. v. Joseph Iron Co.*,<sup>3</sup> the United States Circuit Court of Appeals, Sixth Circuit, in sustaining the finding of the Commission and affirming the judgment of the lower court, stated: "Whether the conclusion so reached by the Commission was intended to be one of law, rather than one of fact, touching the application of the proportional rate of 9½ cents, is not entirely clear. Nor need we consider this feature of the case; for it is plain that the Commission's conclusion of fact that the 30-cent through rate was unreasonable, so far as it exceeded the sum of the proportional rate per 100 pounds from Houston to New Orleans and the existing local rate per 100 pounds from New Orleans to Chicago (26-1/20 cents), is not without support in the evidence and must be accepted by us. The fact that the Railroads were willing to accept 9½ cents to New Orleans on traffic extending beyond New Orleans certainly had a tendency to show that this was a reasonable rate for all such traffic regardless of the destination and there was no attempt to show a good reason for any distinction between Chicago and other points."

See "Joint rates," Section 601, ante.

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1. *Joseph Iron Co. v. Morgan's L. & T. Rd. & S. S. Co.* (1915), 37 I. C. C. Rep. 591.
  2. *Joseph Iron Co. v. Morgan's L. & T. Rd. & S. S. Co.* (1916), 40 I. C. C. Rep. 525, 526.
  3. *Morgan's L. & T. Rd. & S. S. Co. v. Joseph Iron Co.* (1917), 243 Fed. Rep. 149, 151.

#### 609-HH. CANCELLATION OF A JOINT THROUGH RATE RESULTING IN HIGHER COMBINATION OF LOCAL RATES.

Defendants cancelled joint rates on soft coal from Springfield and southern Illinois mines to stations on the Missouri Pacific Ry. in Kansas and Nebraska, leaving to apply combinations of intermediate rates which resulted in higher charges; Held, That the increased rates have not been shown to be reasonable and that the basis in effect prior to the proposed change should be restored.<sup>1</sup>

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1. In the Matter of the Investigation and Suspension of Advances in Rates by Carriers for the Transportation of Soft Coal (1912), 24 I. C. C. Rep. 43.

609-II. HIGHER RATE FOR A SHORTER THAN FOR A LONGER DISTANCE OVER THE SAME LINE OR ROUTE IN THE SAME DIRECTION, THE SHORTER BEING INCLUDED WITHIN THE LONGER DISTANCE.

See "*Fourth Section of the Interstate Commerce Act—Long-and-Short-Haul Clause—Fourth-Section Applications,*" Chapter 7, post.

609-JJ. A RATE VOLUNTARILY ESTABLISHED BY A RAILROAD COMPANY TO MEET COMPETITION IS NOT TO BE TAKEN AS THE MEASURE OF WHAT IS REASONABLE.

In *Louisville & N. Rd. Co. v. Interstate Commerce Commission*,<sup>1</sup> the Commerce Court, per Mr. Judge Archbald, stated: "Nor is a voluntary rate, established to meet competition, to be taken as the measure of what is reasonable. *Lake Shore R. R. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858; *Frederich v. N. Y. N. H. & H. R. R.*, 18 Inters. Comm. R. 481, 484; *Breese-Trenton Mining Co. v. Wabash R. Co.*, 19 Interst. Com. Com. R. 598, 600. And yet that in effect is just what the Commission did in suggesting, in defense of the reduction and restoration which it undertook to make, that the previous rates were not shown negatively not to have been compensatory. It was not incumbent on the railroad at that stage to make this out, but on the complainant to show that the rates as they stood were unjust and unreasonable. The position taken here, on behalf of the Commission, is that a rate, however low, cannot be condemned as unjust if it yield any, the most insignificant, return above the cost of service, a proposition we are not prepared to accede to."

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1. *Louisville & N. Rd. Co. v. Interstate Commerce Commission* (1912), 195 Fed. Rep. 541, 558.

609-KK. HIGHER RATES WHEN SHIPMENTS ARE TENDERED WITH OTHER THAN UNIFORM BILL OF LADING.

A carrier's tariff provided higher rates on shipments not tendered with a uniform bill of lading. *Held*, That the tender of a shipment accompanied by other than a uniform bill of lading may not be taken by the carrier as evidence of the shipper's election to use the higher rate. The carrier must direct his attention to the fact that a lower rate is available under a uniform bill of lading.<sup>1</sup>

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1. Con. Rul. Bul., Rule 160 (April 6, 1909).

609-LL. RELEASED-VALUATION RATES.

In the proceeding *In the Matter of Released Rates*<sup>1</sup> the Commission stated: "The practice of basing rates upon the condition that the carrier shall not be responsible for losses due to causes beyond its control has received legal sanction. Similarly we find no impropriety in a graduation of rates in accordance with the actual values of specific commodities. Household goods, for example, differ widely in value, and it is fair to all that the man who ships goods of low value should receive the benefit of a lower rate than the man who ships more expensive goods. Rate-making upon this principle is in every respect legitimate. It is proper to say, however, that the words 'Value limited

to \* \* \*, are misleading. The phrase 'Agreed to be of the value of \* \* \*,' recently incorporated into the tariffs of the roads which are members of the Southeastern Freight Association are less objectionable. They are indicative of the theory upon which these rates are justified—they are fixed with reference to the real value of the property, and not because of an agreement that the amount of recovery shall be limited to an arbitrary specified amount. We cannot emphasize too strongly our position that these rates must not be used by the carrier as a means for escaping the liability which the law absolutely forbids it to cast off. The same good faith that is required of the carrier is likewise enjoined upon the shipper. The carrier's agent cannot always be expected to know the value of the goods that are tendered for transportation. In most instances it must accept the valuation fixed by the shipper; and when the amount so specified is accepted in good faith and made the basis of the transportation charges, the law will not require the carrier to respond in damages to a greater amount."

The Interstate Commerce Commission in commenting upon the limitation of the carrier's liability for loss or damage to goods contained in section 20 of the Act,<sup>2</sup> stated: "The law prohibits all limitations upon the carriers' liability for the full loss, damage, or injury caused by them to property transported by them, and also all attempts to so limit liability in any form or manner, except when rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property are authorized by us. It is specifically provided that such declaration or agreement shall limit the liability and recovery to an amount not exceeding the amount so declared or agreed to and shall not, so far as relates to values, be held to be in violation of section 10 of the Act. We have taken the view that when such rates have been authorized by us shippers may properly declare a value less than the actual value in order to take advantage of lawfully established released rates or of rates dependent upon the declared value of the property. Rates and ratings dependent upon declared or agreed values are proper and desirable as to many commodities. Important among them are live stock chiefly valuable for breeding, racing, show purposes, or other special uses; wild animals; rugs; household goods and emigrant movables; jewelers' sweepings; paintings or pictures; china or porcelain ware; silk; watches; soap; and various ores and smelter products.

"During the period covered by this report 128 applications were received seeking authority to maintain rates dependent upon declared or agreed values, and 101 orders granting such authority were issued."

In *Orange Rice Mill Co. v. Texas & N. O. Rd. Co.*,<sup>3</sup> the Commission stated: "At the hearing defendants took the position that the rate of 18.5 cents, published to both Orange and Beaumont on blackstrap the 'declared value of which does not exceed 8 cents per gallon,' was legally applicable to the shipments referred to herein. The rate so limited was published without our authority and, under the second Cummins Amendment, the limitation was void, and the rate, while technically legally applicable, was unlawful. *The Cummins Amendment*, 33 I. C. C., 682. *Express Rates, Practices, Accounts and Revenues*, 43 I. C. C., 510. *Williams Co. v. Hartford & New York Transportation Co.*, 48 I.

C. C., 269. Commission's Circular, *In the Matter of Rates Dependent Upon the Declared or Released Value of Property*, of April 26, 1918."

See "Limitation of Common Carrier's Liability—Initial Carrier's Liability," Chapter 20, post.

1. In the Matter of Released Rates (1908), 13 I. C. C. Rep. 550, 564.
2. Thirty-Fourth Annual Report of Interstate Commerce Commission (1920), p. 50).
3. Orange Rice Mill Co. v. Texas & N. O. Rd. Co. (1919), 55 I. C. C. Rep. 661, 663.

The Interstate Commerce Commission, in its thirty-fifth Annual Report to Congress, (1921, p. 41), stated:

"Applications for authority to maintain rates on various commodities, principally ores and smelter products, dependent upon declared or agreed values, in accordance with section 20 of the interstate commerce act, were received to the number of 210. Orders granting such authority numbered 178. Probably more applications would have been made but for the promulgation of a general order, Released Rates Order No. 331, which provide that where authority has been granted under section 20 of the act to establish and maintain rules, regulations, rates or ratings dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, changes in rates, ratings, or carload minimum weights may be established thereafter and filed under authority of the original order without securing new released rates orders, providing that rules, regulations or descriptions of the commodity or commodities to be affected or the declared or agreed value or values on which the same are dependent are not changed, and, provided further, that other routes or points of origin or destination are not added."

**609-MM. A CARRIER MAY NOT DEMAND A HIGHER RATE WHEN FREIGHT IS  
SHIPPED WITH THE CHARGES COLLECT THAN WHEN THE  
CHARGES ARE PREPAID.**

It is fundamental that there can be but one lawful rate between two points, and the law takes no cognizance whatever of the distinction formerly made by the express companies between prepaid and collect shipments. It is a carrier's right as a public service corporation to demand prepayment on all shipments, and it may not distinguish between persons who pay in advance and those who do not. The carrier may waive its right to demand prepayment, and accept a shipment with the understanding it will collect the charges upon delivery to the consignee; but if it does not collect such charges from the consignee, it must look to the consignor for payment. The collection of the lawful rate is a duty imposed on the carrier by law, and it is given a lien upon the property transported to enforce the payment of the charges. To accept a shipment without prepayment is no more than to extend credit to the consignor, and this within reasonable and non-discriminatory limits it may do. But neither a railroad, an express company nor other public carrier may lawfully make rates based upon the waiver of its right to collect charges at the time it receives a shipment. For if there is any risk in the carrying of the shipment without payment of charges, the carrier must, in fulfillment of its own duty under the law, resolve that risk against the consignor and collect in advance. Rates may not be based on a temporary waiver of a carrier's right, nor may the reasonableness of a rate turn upon the assumption that some will pay the lawful charges and others will not, so long as the law gives the right to collect the rate in advance and demands that the carrier shall, without fail, collect its published charges.<sup>1</sup>

1. Boise Commercial Club v. Adams Express Co. (1909), 17 I. C. C. Rep. 115; Railroad Commission of Florida v. Savannah F. & W. Ry. Co. (1891), 5 I. C. C. Rep. 13, 3 I. C. Rep. 688; Boston Fruit & Produce Exchange v. New York & N. E. Rd. Co. (1891), 5 I. C. C. Rep. 1, 3 I. C. Rep. 604.

**609-NN. MINIMUM CHARGE FOR TRANSPORTATION OF LESS-THAN-CARLOAD SHIPMENTS.**

It is reasonable and proper that carriers should fix a minimum weight and charge for the transportation of less-than-carload shipments. This is justified by the necessary expense and trouble attending the carriage of such shipments, large or small, which aside from the actual manual labor involved, are practically the same irrespective of the weight or bulk of the package.<sup>1</sup>

Rule 13, Section 1, of Consolidated Freight Classification, No. 1, provides the following rule governing the minimum charge on single shipments of less-than-carload freight:

Except as otherwise provided, the minimum charge for a single shipment of less-than-carload freight from one consignor to one consignee on one bill of lading shall be:

(a) If classified 1st class or lower, for one hundred (100) pounds at the class or commodity rate applicable thereto; or

(b) If classified higher than 1st class, for one hundred (100) pounds at the 1st class rate; or

(c) If the shipment contains articles in two or more classes, and no article is classified higher than 1st class, for one hundred (100) pounds at the rate applicable to the article taking the highest rate; or if any one of the articles is classified higher than 1st class, the minimum charge shall be for one hundred (100) pounds at the 1st class rate; but

(d) In no case shall the charge on a single shipment be less than fifty (50) cents. When a less-than-carload shipment moves under a rate made by a combination of separately established rates in the absence of a joint through rate, the minimum charge of fifty (50) cents will apply to the continuous through movement and not to each of the separately established factors, except that when the continuous through movement is subject to a combination rate made by using separately established rates that are governed by different classifications, a separate minimum charge will apply to each portion of the through movement that is governed by a different classification.

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1. Wrigley v. Cleveland C. C. & St. L. Rd. Co. (1905), 10 I. C. C. Rep. 412; minimum charge on less-than-carload shipments (1921), 61 I. C. C. Rep. 727.

**609-OO. LOWER RATE FOR CARLOAD THAN FOR LESS-THAN-CARLOAD QUANTITIES**

The transportation of freight at a lower rate in carload quantities than in less-than-carload quantities is not in contravention of the Act to Regulate Commerce. The circumstances and conditions of the transportation in respect to the work done by the carrier and the revenue earned are dissimilar, and may justify a reasonable difference in rate. The public interests are subserved by carload classifications of property that, on account of the volume transported to reach markets or supply the demands of trade throughout the country, legitimately or usually moves in such quantities.<sup>1</sup>

However, a difference in rates upon carloads and less than carloads of the same merchandise between the same points of carriage so wide as to be destructive to competition between large and small dealers especially upon articles of general and necessary use and which, under existing conditions of trade, furnish a large volume of business to carriers, is unjust and violates the provisions and principles of the Act.<sup>2</sup>

The differential between the carload and less-than-carload rate, however, must be reasonable, fair and just.<sup>3</sup>

While, however, it is lawful for the carrier to establish carload and less-than-carload rates on a particular commodity, with a reasonable difference between the two rates and a reasonable carload minimum, the carrier cannot under the law be required to do so.<sup>4</sup>

The Commission has hesitated to require the establishment of carload rates where none exist. If the normal unit of shipment is the carload, as in coal, ore, etc., it is of course a public benefit to secure for all the lower carload rate; but if the accustomed traffic has a less unit than a carload and ordinary shipments are by the ton or bale, or hundredweight, the effect of a newer lower carload rate is to give an advantage to the large shipper—a discrimination the Commission has not encouraged even though its first result is to secure lower rates to the large shipper, less cost to the carrier, and, in its encouragement of trade, to increase the carrier's revenues.<sup>5</sup>

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1. *Thurber v. New York C. & H. R. Rd. Co.* (1890), 2 I. C. Rep. 742, 3 I. C. C. Rep. 473; *Duncan v. Atchison, T. & S. F. Rd Co.* (1893), 6 I. C. C. Rep. 85.
  2. *Thurber v. New York C. & H. R. Rd. Co.*, *supra*.
  3. *Harvard Co. v. Pennsylvania Co.* (1890), 4 I. C. C. Rep. 212; 3 I. C. Rep. 257; *New York Produce Exchange v. Baltimore & O. Rd. Co.* (1898), 7 I. C. C. Rep. 612; *Brownell v. Columbus & C. M. Rd. Co.* (1893), 5 I. C. C. Rep. 638, 4 I. C. Rep. 285; *Scofield v. Lake Shore & M. S. Ry. Co.* (1888), 2 I. C. C. Rep. 90, 2 I. C. Rep. 67; *Business Men's League v. Atchison, T. & S. F. Ry. Co.* (1902), 9 I. C. C. Rep. 318.
  4. *Planters' Compress Co. v. Cleveland C. C. & St. L. Ry. Co.* (1905), 11 I. C. C. Rep. 382.
  5. *Kindel v. Boston & A. Rd Co.* (1905), 11 I. C. C. Rep. 495.

#### 609-PP. TRAIN-LOAD RATES.

It is not always enough that open rates are made and strictly observed, even if fair and reasonable for the service rendered; nor is it sufficient in every case that a relation of rates, just from the carrier's standpoint, is maintained as between shipments of the same article by different methods or in different quantities. For example, a carload rate lower than the less-than-carload rate, where the difference is not too great, would ordinarily be lawful; but a still lower rate for shipments of 100 or 1,000 carloads, even though duly published and impartially applied would be wholly indefensible.<sup>1</sup>

In repeated decisions, the Commission has held that the mere fact that certain traffic is hauled in train-load lots cannot be made the basis of rates different from those applied to shipments in single carloads.<sup>2</sup>

In *Planters' Compress Co. v. Cleveland, C. C. & St. L. Ry. Co.*<sup>3</sup> the Commission said: "Something akin to this in principle was decided by the Commission during the first year of its existence. This was a case where the carrier allowed a discount from its coal rates to consignees receiving not less than 30,000 tons a year. This was held to be unlawful on the ground that it was a condition which most shippers could not meet, and Judge Cooley in that case, speaking of the carriers' offer of a lower rate on 30,000 tons yearly shipments, said that 'a discrimination which should so limit the offer that a part of those who could and might desire to accept it would be excluded from its benefits, would for that very reason be unjust and indefensible.' *Providence Coal Co. v. Providence & W. R. Co.*, 1 I. C. C. Rep. 107, 1 Inters Com. Rep. 363.

"It is upon the same theory that a lower rate for a train load than for a carload is regarded unlawful; because it is in effect allowing lower rates upon a condition which only a few shippers can comply with and consequently is an injustice to those unable to ship the required quantity."

Whatever difference there may be in the cost to the carrier between traffic in train loads and traffic in carloads, it appears from the general course of legislation with respect to commerce between the states, from the debates and reports of the various committees in Congress when the act to regulate interstate commerce was under consideration, from the better considered court opinions, and from the reports and opinions of the Interstate Commerce Commission, that to give greater consideration to trainload traffic than to carload traffic would create preference in favor of large shippers and be to the prejudice of small shippers and the public.<sup>4</sup>

1. *Carr v. Northern P. Ry. Co.* (1901), 9 I. C. C. Rep. 1.
2. *Rickards v. Atlantic C. L. Rd. Co.* (1912), 23 I. C. C. Rep. 239; *Anaconda Copper Mining Co. v. Chicago & E. Rd. Co.* (1910), 19 I. C. C. Rep. 592; *Carstens Packing Co. v. Oregon S. L. Rd. Co.* (1909), 17 I. C. C. Rep. 324; *Planters' Compress Co. v. Cleveland, C. C. & St. L. Ry. Co.* (1905), 11 I. C. C. Rep. 382; *Woodward-Bennett Co. v. San Pedro, L. A. & S. L. Rd. Co.* (1914), 29 I. C. C. Rep. 664.
3. *Planters' Compress Co. v. Cleveland C. C. & St. L. Ry. Co.* (1905), 11 I. C. C. Rep. 382, 402; *Paine Bros. & Co. v. Lehigh V. Rd. Co.* (1897), 7 I. C. C. Rep. 218; *Zimmerman v. Great N. Ry. Co.* (April 3, 1915), Unreported Opinion No. 7225; *Wells Lumber Co. v. Chicago, M. & St. P. Ry. Co.* (1916), 38 I. C. C. Rep. 464, 465, and cases therein cited.
4. *Anaconda Copper Mining Co. v. Chicago & E. Rd. Co.* (1910), 19 I. C. C. Rep. 592, 596.

#### 609-QQ. HIGHER RATES ON PERISHABLE TRAFFIC THAN ON ORDINARY FREIGHT.

Where the carrier renders special service in the transportation of perishable traffic, such as rapid transit and prompt delivery, a higher rate than the carriage of ordinary freight is warranted.<sup>1</sup>

Perishable freight requiring care, refrigeration and expedition in transit and carriage in heavy refrigerator cars, is necessarily transported at greater cost to the carrier than that involved in the transportation of ordinary freight.<sup>2</sup>

The handling of perishable fruit, for instance, is probably the severest test of railroad transportation, so far as care, attention and expense are involved. The very essence of such transportation is expedition in addition to the speed required; there must be provided a special car, loaded with ice, which has to be renewed when the transportation is beyond certain fixed distances, or if, for any cause, there is delay. It is of vital importance to the growers of perishable products and the further development of the business that nothing should be done which would have a tendency to decrease the efficiency of the service.<sup>3</sup>

1. *Loud v. South Carolina Rd. Co.* (1892), 5 I. C. C. Rep. 529, 4 I. C. Rep. 205; *Boston Fruit & Produce Exchange v. New York & N. E. Rd. Co.* (1891), 4 I. C. C. Rep. 664, 3 I. C. Rep. 493.
2. *Consolidated Forwarding Co. v. Southern P. Co.* (1905), 10 I. C. C. Rep. 590.
3. *Ozark Fruit Growers' Assn. v. St. Louis & S. F. Rd. Co.* (1909), 16 I. C. C. Rep. 106.

#### 609-RR. LOWER RATES FOR INLAND MOVEMENT OF EXPORT OR IMPORT TRAFFIC THAN FOR DOMESTIC TRAFFIC

While export rates are ordinarily lower than domestic rates, this is due to competitive conditions between the ports and not to the fact that the cost of service on export shipments is less than on domestic

shipments.<sup>1</sup> Traffic is either local or export; if export, it must take the export rate.<sup>2</sup> For example, lumber from Louisiana points was shipped to New Orleans, La., consigned to the shippers on consignee's order. It was intended by both the carriers and the shippers that the lumber should be exported. *Held*, That shipment from points of origin to New Orleans was not intrastate so as to take the rates prescribed by the Louisiana Railroad Commission, but that the shipment was within the jurisdiction of the Federal government and took the rates on file with the Interstate Commerce Commission.<sup>3</sup>

In fixing the charge for a terminal service on export traffic, the service is considered in the nature of an additional service, for which a reasonable and compensatory charge should be assessed.<sup>4</sup>

In *New Orleans Board of Trade, Ltd. v. Illinois C. Rd. Co.*<sup>5</sup> defendant's export rates from Henderson and Owensboro, Ky., to New Orleans, La., on tobacco are less per 100 pounds when the traffic is destined to Liverpool and Bristol, England, than when destined to other European ports: *Held*, That the different export rates are not justified by any substantial dissimilarity of circumstances and conditions.

In *Erickson Co. v. Chicago, M. & St. P. Ry. Co.*<sup>6</sup> defendant's inland proportion of through rates on "all commodities" from Chicago, Ill., via Vancouver, B. C., on traffic destined to points in Australia exceeds the inland proportion of through rates from the same point of origin to points in Japan, China, and the Philippine Island; *Held*, That the different export rates are not shown of record to result in undue prejudice or disadvantage to complainant. In dismissing the complaint, the Commission stated: "The Commission has never held that it is *per se* unlawful to publish different export rates to a port, dependent on the foreign destination of the traffic. In *New Orleans Board of Trade v. I. C. R. R. Co.*, 23 I. C. C. 465, the defendant maintained different export rates on tobacco to the port of New Orleans, dependent upon the destination in Europe. Upon the facts of record the Commission found that the shippers who were paying the higher export rates were subjected to undue prejudice and disadvantage, but expressed no opinion as to whether the carrier might lawfully maintain export rates to New Orleans on traffic destined to South America different from the export rates on traffic destined to Europe. Such differences in inland proportions are always subject to complaint and investigation in any particular case.

"Upon the facts of record in this case we are unable to find that the maintenance by defendants of export rates on traffic to Australia in excess of the export rates on traffic to the Orient subjects complainant or its traffic to undue prejudice or disadvantage within the meaning of the act."

It is a matter of common knowledge that import rates lower than domestic rates are frequently, if not generally, influenced by considerations which are unrelated to, and have little, if any bearing, upon the reasonableness *per se* of the domestic rates.<sup>7</sup>

See "Lower rate on inland movement of import or export traffic than on domestic commerce, unlawful unless water movement shall have been or is to be in a vessel documented under the laws of the United

*States,' Section 609-YYY, post. "Discriminations, Preferences and Advantages," Chapter 26, post.*

1. National Lumber Exporters' Assn. v. Kansas City S. Ry. Co. (1912), 25 I. C. C. Rep. 78, 85.
2. Mobile Chamber of Commerce v. Mobile & O. Rd. Co. (1914), 32 I. C. C. Rep. 272, 282.
3. Railroad Commission of Louisiana v. Texas & P. Ry. Co. (1913), 33 Sup. Ct. Rep. 837, 840, 229 U. S. 336, 57 L. Ed. 1215.
4. Mobile Chamber of Commerce v. Mobile & O. Rd. Co., *supra*.
5. New Orleans Board of Trade, Ltd. v. Illinois C. Rd. Co. (1912), 23 I. C. C. Rep. 465; New Orleans Board of Trade, Ltd., v. Illinois C. Rd. Co. (1914), 29 I. C. C. Rep. 32.
6. Erickson Co. v. Chicago, M. & St. P. Ry. Co. (1914), 29 I. C. C. Rep. 414, 416.
7. Nagase & Co. Ltd. v. Director General, as Agent, Great N. Ry. Co. (1921), 62 I. C. C. Rep. 422, 424.

**609-SS. THE DIFFERENCE BETWEEN THE IMPORT RATE AND THE DOMESTIC RATE ON A GIVEN COMMODITY SHOULD NOT BE UNDUE OR UNREASONABLE.**

In *Louisiana Sugar Planters' Assn. v. Illinois C. Rd. Co.*<sup>1</sup> the Interstate Commerce Commission stated: "The complainants insist that as the service rendered in transporting the imported blackstrap is exactly the same as the service rendered in transporting the domestic blackstrap, there can be no lower rate on imported blackstrap than on domestic blackstrap. It is now too late, however, to discuss that question, as the Supreme Court in *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, known as the *Import Rate case*, held that foreign traffic when carried from the port of entry to final destination and domestic traffic carried from the same port to the same destination are not traffic of 'like kinds,' and that the service in the one case is not performed under circumstances and conditions substantially similar to those under which the service rendered in the other case is performed, and that therefore the rates on the two kinds of traffic need not be the same. Following that case we have repeatedly recognized the right of carriers to maintain lower rates on import traffic than on domestic traffic, and imported goods move in large volume on special rates which are lower than the rates charged on goods of the same kind which have not been imported. It does not follow, however, because an import rate which is lower than the domestic may be maintained on blackstrap that the difference in the two rates may be whatever the carriers may choose to establish. In the *Import Rate case, supra*, the court held that the Commission in determining whether or not the difference made by the carrier between the import rate and the domestic rate was unjust should consider all the circumstances and conditions, including the interests of carriers, producers, dealers, and consumers. The court said:

"Commerce, in the largest sense, must be deemed to be one of the most important subjects of legislation, and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally to be attributed to Congress. The very terms of the statute, that charges must be *reasonable*, that discrimination must not be *unjust*, and that preference or advantage to any particular person, firm, corporation, or locality must not be *undue* or *unreasonable*, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers, and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act."

"It is not the duty of the Commission to determine merely whether or not some difference may be made, but to determine whether or not the particular difference made is unreasonable, and if unreasonable the

extent to which it is unreasonable. The Commission, following the Import Rate Case, had repeatedly said that the difference made between the import rate and the domestic rate must be a reasonable difference, or such as is reasonably necessary.

"In *Pittsburgh Plate Glass Co. v. Pittsburgh, C. C. & St. L. Ry. Co.*, 13 I. C. C. 87, 99, we said:

"Not all discriminations are unlawful, but only such as are undue or unreasonable; if based on reason and good cause, discriminations cannot be condemned as unreasonable. It is well settled by the highest judicial authority that the existence and effectiveness of competition between carriers, whether by rail or water, whether subject to the federal act of regulation or not, and competition of markets, or the absence of such competition, are, among other things, pertinent to the question of similarity of circumstances and conditions involved in the ultimate question of fact under sections 3 and 4, and as to whether the discrimination complained of and shown is or is not undue or unreasonable. Since, in view of these rulings, it is the duty of the Commission in passing upon these questions to look to these and other facts, wherever found, pertaining to the traffic involved, upon the theory that the carriers may lawfully within reason meet the circumstances and conditions which confront them. It follows that we must recognize the due and logical effect of the situation thus presented. The necessary conclusion is that discriminations of the nature referred to in sections 3 and 4 of the act, in so far as they result from *bona fide* action of a carrier in meeting circumstances and conditions not of its own creation, and which are reasonably necessary for that purpose, do not of necessity fall under the condemnation of the law."

"Again, in *Chamber of Commerce of New York v. N. Y. C. & H. R. R. R. Co.*, 24 I. C. C. 55, 74, the Commission said:

"We have no jurisdiction over the ocean rates and must deal with this question as though the ports were destinations instead of gateways. This does not mean that the carriers may not take into consideration the previous or further transportation of the traffic of the ocean and thus differentiate it, reasonably, from domestic traffic, but rates to and from ports must be reasonable, must be published as independent from the ocean transportation, and are subject to all the provisions of the act."

"Having concluded that there may be some difference between the import rate and the domestic rate on blackstrap molasses, we must now determine whether or not the difference made is a reasonable difference; and if not, we must determine the extent to which the existing difference is unreasonable. The difference between the two rates should not be so great as to materially injure a domestic industry if a smaller difference would enable the imported article to move freely, and at a cost to the consumer which would not be unreasonable."

See "*Lower rate on inland movement of import or export traffic than on domestic commerce, unlawful unless water movement shall have been or is to be in a vessel documented under the laws of the United States*", Section 609-YYY, post.

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1. Louisiana Sugar Planters' Assn. v. Illinois C. Rd. Co. (1914), 31 I. C. C. Rep. 311, 317 et seq; affirmed, Louisiana Sugar Planters' Assn. v. Illinois C. Rd. Co. (1915), 34 I. C. C. Rep. 253.

**609-TT. AN IMPORTED COMMODITY IS NOT ENTITLED TO AN INLAND PROPORTIONAL RATE WHICH IS LOWER THAN THE DOMESTIC RATE WHEN THE TRANSPORTATION FROM THE PORT OF ENTRY IS PURELY LOCAL.**

An importer of flax after unloading a cargo at the ports, sold it, and the purchaser some months later sold a part of the original shipment to a manufacturing company, by which it was shipped to a point in the Middle West at the regular local rate of the carrier that took the movement. At the same time there was in effect an inland proportional rate from the port of destination: *Held*, That the movement from the

port was a separate and distinct transaction upon which the local rate was the only lawfully applicable rate.<sup>1</sup> It should be noted in this case that the shipment lost its identity as an import after having been held in warehouse by the purchaser at port of entry.

In *Louisiana Sugar Planters' Assn. v. Illinois C. Rd. Co.*<sup>2</sup> in adhering to its former report and order the Commission stated: "The only finding of fact which is questioned is the ultimate conclusion that the charging of rates on imported blackstrap molasses from the ports of New Orleans and Mobile which are lower than the rates charged on domestic blackstrap from the same ports is not unjustly discriminatory against domestic blackstrap."

"Counsel for the intervener insist that this case is unlike the *Import Rate case*, 162 U. S. 197, cited in the original report, for the reason that in that case the import traffic moved under a through bill of lading from the foreign point of origin and would have moved to destination wholly by water if the rail carrier had not made a lower rate from an intermediate port than that it charged on domestic traffic from the same port. While it is true that the import traffic involved in that case could and probably would have moved all the way to destination by water if the carrier had not made a lower rate than that it charged on domestic traffic by rail from the same intermediate port, it is also true that in the instant case the imported product could not move at all from the port of entry to interior destinations in competition with the domestic product but for rates somewhat lower than the domestic rates. We therefore have here a case where it is to the interest of both carriers and consumers that the rate should be made low enough to make it possible for the imported product to move, thus bringing the case clearly within the principle of the *Import Rate Case*.

"It is said, however, that the mere fact that goods were imported at some time in the past does not entitle them to a lower rate than that charged on goods produced in this country; but conceding that to be true the rates on blackstrap here involved apply only where the blackstrap is pumped from tank steamers into storage tanks on the railroad right of way and then pumped from those tanks into the tank cars in which it is shipped by rail from the port, the identity of the imported shipment being preserved. When imported goods have been mingled with and have become a part of the general property of the country, no difference can be made between the rates on such goods and goods of domestic origin for the reason that there can in such event be no certainty of identity. Carriers and shippers are both responsible for misapplication of the import rates to domestic shipments by commingling the imported products with domestic, or otherwise.

"The fact that the rail transportation from the port is not under a through bill of lading is not material. While the traffic involved in the *Import Rate case* did not move under a through bill of lading, that fact, as clearly appears from the reasoning of the court, did not affect the conclusion. Nor should the possibility of cheating by pumping domestic blackstrap into the storage tanks and thus defeating the published rate on domestic blackstrap outlaw altogether a practice reasonable and lawful in itself. No tariff is self-operative to the effectual prevention of the possibility of fraud. Carriers must take the necessary precautions to preserve the integrity of published rates."

See "Lower rate on inland movement of import or export traffic than on domestic commerce, unlawful unless water movement shall have been or is to be in a vessel documented under the laws of the United States," Section 609-YYY, post.

1. Con. Rul. Bul., Rule 170, (April 13, 1909).
2. Louisiana Sugar Planters' Assn. v. Illinois C. Rd. Co. (1915), 34 I. C. C. Rep. 253; affirming, Louisiana Sugar Planters' Assn. v. Illinois C. Rd. Co. (1914), 31 I. C. C. Rep. 311.

**609-UU. REQUIREMENT THAT IMPORT FREIGHT BE PLACED IN A BONDED WAREHOUSE OR DELIVERED TO THE RAIL CARRIER DIRECT FROM SHIP'S SIDE OR DOCK OF VESSEL AS CONDITION PRECEDENT TO APPLICATION OF IMPORT RATE.**

In *Swift & Co. v. Baltimore & Ohio Rd. Co.*<sup>1</sup> the Commission stated: "The Baltimore & Ohio Rd. Co. owns the bonded warehouse at Locust Point. The complainants endeavored to obtain storage for this shipment, but could not, owing to the fact that the bonded warehouses of the defendant were filled with the traffic of other shippers. Thereupon the complainant endeavored to obtain storage in other bonded warehouses, without avail, and the consequent higher rate was imposed. The traffic of the Baltimore & Ohio were not objectionable for the reason that they required as a condition of according the import rate that the traffic should be stored in a bonded warehouse or delivered to the carrier from the ship itself. The railroad not only had the right but ought to protect itself by some effective means against the improper application of the import rate.

"The tariff did, however, contain upon its face an unlawful discrimination, in that it provided that storage would be given *when available*. This meant that one shipper might receive this concession while it was refused to another.

"The practical application of the tariff in this case, therefore, has been to unjustly discriminate against the complainant in that it has been compelled to pay a domestic rate, and reparation will therefore be awarded in the difference between that rate and the import rate."

In the case of *National Dock & Storage Warehouse Co. v. Boston & A. Rd. Co.*,<sup>2</sup> the Commission stated. "The complainant, National Dock & Storage Warehouse Company, is a corporation duly organized and existing under the laws of the commonwealth of Massachusetts, and bonded and licensed under such laws to do a general warehouse business. The issue in this case is whether a certain rule of defendants' tariffs relating to the application of rates on import traffic shipped from Boston, Mass., subjects complainant to unjust discrimination or undue prejudice. The rule in question reads as follows:

"Rates named herein apply only on property coming from foreign ports (other than ports in the maritime provinces and Newfoundland) into the United States and delivered to the rail carrier direct from the ship's side or dock of the vessel bringing such property to Boston, or on such property received by rail carrier from customs bonded warehouses or appraisers' stores (not internal revenue stores)."

"There is no substantial dispute as to the facts. Complainant owns and operates a public warehouse at East Boston, Mass., for the storage of all kinds of traffic, whether foreign or domestic. It also maintains a wharf on the east side of Boston Harbor, at which steam-

ers unload traffic consisting chiefly of wool and hides from South America.

"The defendant, Boston & Albany Railroad Company, operates a warehouse on the east side of Boston harbor for the storage of import and export traffic, and occasionally of domestic traffic, chiefly cotton and wool, but its warehouse is operated chiefly as an adjunct to its transportation service. The two warehouses are in active competition with each other for storage traffic, both import and export, and domestic cotton and wool. The rails of the Boston & Albany reach complainant's warehouse, as well as its own, and make connection between such warehouse and the docks of the harbor.

"The commodities involved in this proceeding are wool and hides, which are imported free of duty and are not stored in 'customs bonded warehouses or appraisers' stores.' These commodities are shipped from complainant's warehouse chiefly to Montreal, Canada, and to Montreal rate points, to all of which import rates are published from Boston and East Boston. The import rates are considerably lower than the domestic rates, and under the tariff rule in question import traffic stored in the warehouse of the Boston & Albany is given the benefit of import rates when shipped out to points that bring shipments within the act, but if stored in and shipped from complainant's warehouse domestic rates are applied.

"Prior to January 1, 1914, wool and some kinds of hides were dutiable, and therefore generally went into 'bonded warehouses or appraisers' stores,' and under the tariff rule were entitled to import rates when shipped out. When storage is in such a warehouse the importer to obtain his goods must pay the duty, which fact constitutes a protection against the danger of an improper application of the rate and distinguishes such storage from that of complainant here involved. When such storage is with a carrier upon delivery direct from the incoming ship the carrier can and must under the law see that the import rate is properly applied.

"The storage charges of the Boston & Albany are filed with this Commission and are and must be uniform as to all shipments. The complainant files no tariffs and may make different charges to different persons for like services.

"In *Swift & Co. v. B. & O. R. R. Co.*, 21 I. C. C., 241, 242, we said:

"The tariffs of the Baltimore & Ohio were not objectionable for the reason that they required as a condition of according the import rate that the traffic should be stored in a bonded warehouse or delivered to the carrier from the ship itself. The railroad not only had the right but ought to protect itself by some effective means against the improper application of the import rate."

"In the operation of the warehouse here in question complainant gives bond under the Massachusetts Statute, but is under no statutory or contractual obligation to protect carriers against application of import rates to domestic traffic or to foreign traffic which for various reasons may not be entitled to such rates.

"From all the facts of record we find and conclude that the tariff provisions here attacked are not shown to be unjustly discriminatory nor unduly prejudiced.

"An order dismissing the complaint will be entered."

See "Lower rate on inland movement of import or export traffic than on domestic commerce, unlawful unless water movement shall have been or is to be in a vessel documented under the laws of the United States, 609-YYY, post.

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1. Swift & Co. v. Baltimore & O. Rd. Co. (1911), 21 I. C. C. Rep. 242.
  2. National Dock & Storage Warehouse Co. v. Boston & A. Rd. Co. (1915), 33 I. C. C. Rep. 330.

**609-VV. CARRIERS MAY NOT ADJUST THEIR RATES SO AS TO REGULATE FOREIGN TRAFFIC THROUGH CERTAIN PORTS.**

In *Chamber of Commerce of the State New York v. New York C. & H. R. Rd. Co.*<sup>1</sup> the Commission stated: "Boston suggests that New York had little to say as to diversion of export traffic from New York to Boston 'for the very good reason that the inland export rates are the same to the two ports,' and that on equal export rates, inland and ocean, New York 'is cutting the ground from under Boston.' It is difficult to see how any unjust discrimination against Boston can be found in an adjustment which for a substantially longer rail haul gives it the same rates as New York, and it is equally difficult to see upon what basis we would find that Boston is entitled to lower inland rates on traffic to or from differential territory than is New York.

"It is said that under equal inland rates to New York and Boston any change in the relative movement of this traffic caused by change in the ocean rates simply manifests the need of the steamship lines which have lines common to both ports for the particular traffic at the respective ports. Manifestly this is so and it ought to be so, and in a modified degree it is true where differentials exist, for the ocean rates to and from the differential ports are fluctuated in order to accommodate the needs and wishes of the steamship lines. Each of the ports contends that its traffic is 'diverted' to one or more of the other ports, but inasmuch as no fixed proportion of the traffic has been assigned to any port and as the records show that the percentages of traffic moving through the different ports varies from year to year and from period to period, it would seem more accurate to say that the rate adjustments are made for the purpose of attracting traffic to the several ports.

"In recent years certain steamship lines have arranged their sailings so that their vessels land at Boston or Philadelphia on the westward voyage and proceed thence to Baltimore to leave part of their cargo and to secure cargo for the eastward voyage. The exports of grain from Baltimore have greatly increased in recent years. It may be that this is to some extent due to the differential rates, but to some extent it is because of attractive port facilities for the handling of that traffic, and in part it comes from the large quantities of near-by grain which could not under any reasonable rate adjustment find outlet through the other ports.

"Boston experiences some difficulty in getting steamers to come there with imports which it needs because the vessels are unable to there secure eastbound lading. But it cannot be that in law the duty devolves upon the railroads to so adjust their rates as to equalize those conditions, or that it is within the reasonable and proper exercise of the powers of this Commission to require such adjustments. If certain

imports would naturally move to Boston and certain exports would naturally move from Baltimore, why should the railroads or this Commission so adjust the rail rates as to equally divide that tonnage and insure equal steamship sailings to and from those ports?"

Whether export and import traffic will move through a particular port, depends upon the combined rail and water rate to the foreign destination. The competition is between port and port rather than between railroads to a given port.<sup>2</sup>

The differential system is intended to adjust on a practical basis the rivalries of the northern seabound ports on import, export and domestic traffic.<sup>3</sup>

1. Chamber of Commerce of the State of New York v. New York C. & H. R. Rd. Co. (1912), 24 I. C. C. Rep. 55, 64.
2. New England Investigation (1913), 27 I. C. C. Rep. 560, 613.
3. Scott Paper Co. v. Pennsylvania Rd. Co. (1913), 26 I. C. C. Rep. 601, 602.

#### 609-WW. ANY-QUANTITY RATES.

The Interstate Commerce Commission has decided that where carriers have in effect a uniform rate per 100 pounds for freight in any quantities, which rate applies uniformly to all shippers, a different rate applied to carloads from that applied to less-than carloads will not be ordered, especially when such differential will have a tendency to increase the rate on less-than carloads and further to cut off consumers and small dealers from purchasing at distant market in less-than carload lots.<sup>1</sup>

The any-quantity rate rests upon sound public policy. It enables the small shipper to compete on fairly equal terms with his powerful competitor, thereby counteracting in a measure the public tendency towards monopoly. While the Commission has consistently sustained the legality of a differential between carload and less-than-carload rates upon the ground that the difference in cost of service justifies a reasonable difference in charge, it is highly significant that no order has ever been issued requiring that an any-quantity basis be superseded.<sup>2</sup>

When a carrier instead of providing a carload and less-than-carload rate, provides only an any-quantity rate, the presumption is that it is higher than a carload rate and lower than a less-than-carload rate would be.<sup>3</sup>

One of the benefits, if not one of the objects, of an "any-quantity rate" is that it leaves the carrier with some freedom in the use of its equipment. Such a tariff gives the shipper no right to demand a car of a given size.<sup>4</sup>

Under a local any-quantity rate, the carrier may use any available equipment notwithstanding the fact that the tariffs of a connecting line provide a minimum weight under a carload rate.<sup>5</sup>

The unit of transportation is one for carriers to decide as long as they publish reasonable any-quantity rates, and they will not ordinarily be required to apply different rates to carloads than to less-than carloads, especially if to do so would tend to increase the prevailing rates for less-than carloads.<sup>6</sup>

Though the Commission has often recognized the propriety of differential between carload and less-than-carload rates, it does not follow that an any-quantity rate is by reason of being such, unreasonable when applied to carload traffic.<sup>7</sup>

Dairy products, dressed poultry, fresh fish, and sometimes fresh meat are usually based on any-quantity rates.<sup>8</sup>

Under conditions which exist in the cotton business an any-quantity rate is a practical necessity, and an order requiring that it be superseded by carload and less-than-carload rates would be detrimental to the public interests.<sup>9</sup>

Replacing an any-quantity rate by a carload and less-than-carload rate is not unlawful.<sup>10</sup>

The Commission has approved the application of any-quantity rates on traffic moving by freight in the absence of a showing that the demands of the public would not be adequately served unless carload rates were established.<sup>11</sup>

The fact that an any-quantity rating is applied does not necessarily show that the charges resulting are unreasonable or unduly prejudicial to the carload shipper. If, however, the rating does result in unreasonable or unduly prejudicial charges, the Commission has the power and it is its duty to prescribe just and reasonable rates.<sup>12</sup>

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1. Duncan & Co. v. Nashville C. & St. L. Ry. Co. (1909), 16 I. C. C. Rep. 590; Taylor Dry Goods Co. v. Missouri P. Ry. Co. (1913), 28 I. C. C. Rep. 205.
  2. Commercial Club of Omaha v. Baltimore & O. Rd. Co. (1910), 19 I. C. C. Rep. 397; citing Brownell v. Columbus & C. M. Rd. Co. (1893), 5 I. C. C. Rep. 638, 4 I. C. Rep. 285; Kindel v. Boston & A. Rd. (1905), 11 I. C. C. Rep. 495, 506; Weil v. Pennsylvania Rd. Co. (1906), 11 I. C. C. Rep. 627; Duncan & Co. v. Nashville C. & St. L. Ry. Co. (1909), 16 I. C. C. Rep. 590; Procter & Gamble Distributing Co. v. Alabama C. Ry. Co. (1921), 61 I. C. C. Rep. 700.
  3. Mutual Rice Trade & Development Assn. of Houston v. International & G. N. Rd. Co. (1912), 23 I. C. C. Rep. 219, 224.
  4. Falls & Co. v. Chicago, R. I. & P. Ry. Co. (1909), 15 I. C. C. Rep. 269, 272.
  5. Ibid.
  6. Stuarts Draft Milling Co. v. Southern Ry. Co. (1914), 31 I. C. C. Rep. 623, 631; Greater Des Moines Committee v. Chicago R. I. & P. Ry. Co. (1909), 17 I. C. C. Rep. 54; Bentley & Olmsted Co. v. Lake Shore & M. S. Ry. Co. (1909), 17 I. C. C. Rep. 56.
  7. Wichita Business Assn. v. Atchison, T. & S. F. Ry. Co. (1914), 30 I. C. C. Rep. 45, 52.
  8. Minimum Weight on Fresh Meats and Other Commodities (1914), 30 I. C. C. Rep. 349.
  9. American Round Bale Press Co. v. Atchison, T. & S. F. Ry. Co. (1914), 32 I. C. C. Rep. 458, 465.
  10. Jouannet v. Atlantic C. L. Rd. Co. (1912), 23 I. C. C. Rep. 392.
  11. Kimberly Clark Co. v. American Ex. Co. (1917), 45 I. C. C. Rep. 7; citing, Stuarts Draft Milling Co. v. Southern Ry. Co. (1914), 31 I. C. C. Rep. 623.
  12. Kansas Car-Lot Egg Shippers Assn. v. Baltimore & O. Rd. Co. (1919), 53 I. C. C. Rep. 59, 63.

#### 609-XX. GROUP OR "BLANKET" RATES.

In the transportation of low-grade commodities that move in bulk and in large quantities, such as coal, lumber, grain, etc., it is a long established custom to group or "blanket" a number of stations or a large expense of territory. Such rate adjustment, necessarily, to some extent, disregards distance. In the case of grain moving from points of origin, if strictly distance rates were applied, it is apparent that a certain distance from a market that is prepared to purchase the surplus the rate would be prohibitive.<sup>1</sup> Therefore, in all cases of "blanket" or group rates there is, of necessity, more or less disregard of

distance and varying degrees of inequality, but such inequalities are not of necessity unreasonable or unjust when the situation is viewed from every standpoint, taking into account all interests.

Absolute and demonstrable equality in all respects is not attainable. Reasonable approximation is the most that can be expected ordinarily. Though not always the case, these grouping or blanket arrangements in many cases, especially with reference to particular commodities, are of great advantage to the public and without serious injustice to any interests.<sup>2</sup>

In *The New York Harbor Case*<sup>3</sup> the Commission stated: "The practice of embracing many points within the same group or zone has been so generally adopted by the carriers and so frequently recognized as proper by this Commission that its general propriety can hardly be challenged. Not only does this practice greatly simplify the publication of tariffs, to the convenience of both the carriers and the public, but the application of a common rate to a number of points in the same general territory effects an equality of opportunity which is usually most desirable; and this is particularly true where the points in question produce and ship the same commodity or derive their raw materials from the same sources. Producers in all parts of the port of New York are manufacturing goods for sale in common markets throughout the world.

"Actual distances and actual costs are commonly disregarded in the construction of rate groups, and so long as their general propriety is recognized it is of course impossible to entertain the view that a rate is unlawful solely because it does not reflect with approximate accuracy the actual cost of performing the transportation service.

"In *Stiritz v. N. O., M. & C. R. R. Co.*, 22 I. C. C., 578, 581, we said:

"The Commission has repeatedly recognized and approved the grouping of points, within reasonable limits, for the purpose of making rates, and it will not disturb such groupings in the absence of proof that as to particular points in a zone the adjustment results in unreasonable rates or undue prejudice and disadvantage."

"The chief justification for a rate zone is that it places all producers on the same footing in a given market. *Ferguson Saw Mill v. St. L., I. M. & S. Ry. Co.*, 18 I. C. C., 396, 398. Blanket or group rates in many cases are of great advantage to the public without serious injustice to any interest, though there is of necessity more or less disregard of distance and varying degrees of inequality. *Chicago Lumber & Coal Co. v. T. S. Ry. Co.*, 16 I. C. C., 323, 334.

"Grouping or blanket arrangements are of great advantage to the public, and, once established, groups should not be lightly or unnecessarily disturbed. *Clyde Coal Co. v. P. R. R. Co.*, 23 I. C. C., 135, 138. But the Commission has never approved a group rate that resulted in undue prejudice to any part of the group; and whether or not the grouping of points constitutes undue or unjust discrimination must be determined from the facts in each case. *Southwestern Missouri Millers Club v. M. K. & T. Ry. Co.*, 22 I. C. C., 442; *Muskogee Traffic Bureau v. A., T. & S. F. Ry. Co.*, 17 I. C. C., 169, 173."

In the interest of the shipping and consuming public a carrier has the undoubted right to consider within proper limitations the conditions under which industries on its lines in the same general territory

with other industries are compelled to conduct their business. One of these conditions may be a handicap of higher rates on raw material. Groups in rate-making are, therefore, made largely with respect of business as distinguished from transportation conditions. In other words, grouping is done with a reasonable disregard to commercial conditions.<sup>4</sup>

For instance, as coal is one of the principal necessities of life, it would not be in the public interest to enhance the cost to consumers by compelling a higher rate from more distant points in a particular coal district, to which a group rate is applied, for the purpose of increasing the profits of miners more favorably situated with respect to a common market.<sup>5</sup>

It frequently happens that group rates are the most just, and promote, in the highest degree, healthy competition. Whether a coal mine can sell in a particular market usually depends upon its rate of freight, and it is the almost universal custom to create groups which embrace certain mines, giving to all these mines the same rate, even though the distance may be different.<sup>6</sup> To make such rates illegal, however, they must operate to subject some shipper, locality or species of traffic to undue or unreasonable disadvantage.<sup>7</sup>

When the difference in the transportation expense from the various parts of a given district is considerable and substantial group rates should not be discouraged.<sup>8</sup>

There is no requirement of law that origin and destination groups shall be co-extensive in area. Except, perhaps, in the adjustment of transcontinental rates it may be said to be the usual practice for origin group rates to apply to destination points singly or grouped only a few together. This is the general plan of the adjustment of the rates applicable from the coal and lumber blanket territories of the country, which present the most typical and important instances of grouping.<sup>9</sup>

In *Silica Sand Producers' Ass'n. v. Director General, Chicago, B. & Q. Rd. Co.*<sup>10</sup> the Commission stated: "In support of the contention that the zone system should be replaced by a more orderly progression of rates, complainants point out irregularities in ton-mile and car-mile earnings to points within a given group and to points in other groups. Such irregularities are to be found in any group system of rates, and so long as the rates are not unreasonable, or otherwise in violation of the act, the fact that the method of profession is not according to any particular mathematical system, does not subject them to condemnation."

Necessarily points on the farther edge of a group have more favorable rates, relatively, than under a distance scale, and points on the nearer edge, have less favorable rates.<sup>11</sup>

Of course, the propriety of the application of a group rate is open to challenge in every case, and every case must be justified upon its own facts and peculiar circumstances.<sup>12</sup>

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1. Kansas City Transportation Bureau v. Atchison, T. & S. F. Ry. Co. (1909), 16 I. C. C. Rep. 195.
  2. Chicago Lumber & Coal Co. v. Tioga S. E. Ry. Co. (1909), 16 I. C. C. Rep. 323.
  3. New York Harbor Case (1917), 47 I. C. C. Rep. 643, 712, 713; Goodman Drilling Co. v. Director General, as Agent, Fort Worth & D. C. Ry. Co. (1921), 61 I. C. C. Rep. 164, 167.

4. Avery Mfg. Co. v. Atchison, T. & S. F. Ry. Co. (1909), 16 I. C. C. Rep. 20; Imperial Coal Co. v. Pittsburgh & L. E. Rd. Co. (1889), 2 I. C. C. Rep. 618, 2 I. C. C. Rep. 436.
5. Imperial Coal Co. v. Pittsburgh & L. L. Rd. Co., *supra*.
6. In the Matter of the Investigation of Alleged Unreasonable Rates and Practices Involved in the Transportation of Wool, Hides, and Pelts from various Western Points of Origin to Eastern Destinations (1912), 23 I. C. C. Rep. 151, 164; Wisconsin & Arkansas Lumber Co. v. St. Louis, I. M. & S. Ry. Co. (1915), 33 I. C. C. Rep. 33.
7. Hilton Lumber Co. v. Wilmington & W. Rd. Co. (1901), 9 I. C. C. Rep. 17; La-Crosse Manufacturers & Jobbers' Union v. Chicago, M. & St. P. Ry. Co. (1888), 1 I. C. C. Rep. 629, 2 I. C. Rep. 9; Lippman & Co. v. Illinois C. Rd. Co. (1889), 2 I. C. C. Rep. 784, 2 I. C. Rep. 414.
8. Newland v. Northern P. Rd. Co. (1894), 6 I. C. C. Rep. 131, 4 I. C. Rep. 474.
9. St. Louis Chamber of Commerce v. Baltimore & O. Rd. Co. (1920), 57 I. C. C. Rep. 639, 648.
10. Silica Sand Producers Assn. v. Director General, Chicago, B. & Q. Rd. Co. (1920), 58 I. C. C. Rep. 549, 552.
11. Corporation Commission of North Carolina v. Director General, Atlantic C. L. Rd. Co. (1921), 62 I. C. C. Rep. 64, 70.
12. Howell v. New York L. E. & W. Rd. Co. (1888), 2 I. C. C. Rep. 272, 2 I. C. Rep. 162; Imperial Coal Co. v. Pittsburgh & L. E. Rd. Co. *supra*. See following cases on the question of blanket rates: Delaware State Grange v. New York, P. & N. Rd. Co. (1892), 5 I. C. C. Rep. 161, 3 I. C. Rep. 828; Milk Producers Protective Assn. v. Delaware, L. & W. Rd. Co. (1897), 7 I. C. C. Rep. 92; Dallas Freight Bureau v. Missouri, K. & T. Ry. Co. (1907), 12 I. C. C. Rep. 427; Bovaird Supply Co. v. Atchison, T. & S. F. Ry. Co. (1908), 13 I. C. C. Rep. 56, 66; Black Mountain Coal Land Co. v. Southern Ry. Co. (1909), 15 I. C. C. Rep. 286, 292; Hitchman Coal & Coke Co. v. Baltimore & O. Rd. Co. (1909), 16 I. C. C. Rep. 512, 520, 521; Saginaw Board of Trade v. Grand T. Ry. Co. (1909), 17 I. C. C. Rep. 128, 136; Muskogee Traffic Bureau v. Atchison, T. & S. F. Ry. Co. (1909), 17 I. C. C. Rep. 169, 173; Ferguson v. St. Louis, I. M. & S. Ry. Co. (1910), 18 I. C. C. Rep. 391, 393; Ferguson v. St. Louis, I. M. & S. Ry. Co. (1910), 18 I. C. C. Rep. 396, 398; Commercial Club of Salt Lake City, Utah, v. Atchison, T. & S. F. Ry. Co. (1910), 19 I. C. C. Rep. 218, 226; Corporation Commission of the State of North Carolina v. Norfolk & W. Ry. Co. (1910), 19 I. C. C. Rep. 303, 309; In the Matter of the Investigation and Suspension of Advances in Rates by Carriers for the Transportation of Cement Plaster from Stations in Oklahoma to Stations in Texas (1911), 21 I. C. C. Rep. 591, 594; Arlington Heights Fruit Exchange v. Southern P. Co. (1911), 22 I. C. C. Rep. 149, 154, 156; Southwestern Missouri Millers' Club v. Missouri, K. & T. Ry. Co. (1912), 22 I. C. C. Rep. 422, 425; Stiritz v. New Orleans, M. & C. Rd. Co. (1912), 22 I. C. C. Rep. 578, 581; In the Matter of the Investigation of Alleged Unreasonable Rates and Practices Involved in the Transportation of Wool, Hides, and Pelts from Various Western Points of Origin to Eastern Destinations (1912), 23 I. C. C. Rep. 151, 164; Transportation Bureau of the City of Wichita, Kansas, v. St. Louis, & S. F. Rd. Co. (1912), 23 I. C. C. Rep. 679, 680; Santa Rosa Traffic Assn. v. Southern P. Co. (1912), 24 I. C. C. Rep. 46; Anadarko Cotton Oil Co. v. Atchison, T. & S. F. Ry. Co. (1912), 24 I. C. C. Rep. 327, 330; Johnson v. Chesapeake & O. Ry. Co. (1912), 24 I. C. C. Rep. 698; Multnomah Lumber & Box Co. v. Southern P. Co. (1912), 25 I. C. C. Rep. 123, 128; Southern Furniture Mfrs. Assn. v. Southern Ry. Co. (1912), 25 I. C. C. Rep. 379, 386; Switzer Lumber Co. v. Kansas City S. Ry. Co. (1912), 25 I. C. C. Rep. 611; Taylor v. Norfolk & W. Ry. Co. (1912), 25 I. C. C. Rep. 613; Superior Commercial Club of Superior, Wis. v. Great N. Ry. Co. (1912), 25 I. C. C. Rep. 342, 345; Chamber of Commerce of Milwaukee v. Chicago, M. & St. P. Ry. Co. (1912), 25 I. C. C. Rep. 342; Duluth Board of Trade v. Great N. Ry. Co. (1912), 25 I. C. C. Rep. 342; In the Matter of the Investigation and Suspension of Advances in Rates by Carriers for the Transportation of News Print Paper from Sault Ste. Marie, Ontario, to Various Points in the United States (1913), 26 I. C. C. Rep. 13, 19; In the Matter of the Investigation and Suspension of Advances in Rates by Carriers for the Transportation of Various Commodities from Eastern Shipping Points to Points in California, Oregon, Washington, and British Columbia (1913), 26 I. C. C. Rep. 456, 461; Texas Cement Plaster Co. v. St. Louis & S. F. Rd. Co. (1913), 26 I. C. C. Rep. 508; Waukesha Lime & Stone Co. v. Chicago, M. & St. P. Ry. Co. (1913), 26 I. C. C. Rep. 515, 518; In the Matter of the Investigation and Suspension of Advances in Rates by Carriers for the Transportation of Certain Commodities between Certain Stations located in Texas Common-Point Territory and St. Louis, Mo. and Other Points (1913), 26 I. C. C. Rep. 528, 538; West Virginia Rail Co. v. Baltimore & O. Rd. Co. (1913), 26 I. C. C. Rep. 622; Betcher v. Chicago, M. & St. P. Ry. Co. (1913), 26 I. C. C. Rep. 335; Brown v. Boston & M. Rd. Co. (1913), 27 I. C. C. Rep. 47; In the Matter of the Investigation and Suspension of Advances in Class and Commodity Rates by Carriers operating between New Orleans, La., and Other Points in the South and Points in Illinois (1913), 27 I. C. C. Rep. 122; Lumber Rates from Southern Mills to Certain Points in the East (1913), 27 I. C. C. Rep. 189; Chicago-Duluth Grain Rates (1913), 27 I. C. C. Rep. 216, 217; Clinton Mfrs. & Shippers' Assn. v. Chicago & A. Rd. Co. (1913), 27 I. C. C. Rep. 230, 232; Federal Milling Co. v. Minneapolis, St. P. & S. M. Ry. Co. (1913), 27 I. C. C. Rep. 696; Victor Mfg. Co. v. Southern Ry. Co. (1913), 27 I. C. C. Rep. 661, 664; In the Matter of the Investigation and Suspension of Advances in Class and Commodity Rates between Points in Iowa and Minnesota and Points in Pacific Coast Territory (1913), 28 I. C. C. Rep. 1; Iowa State Board of Railroad Commis-

sioners v. Arizona E. Rd. Co. (1913), 28 I. C. C. Rep. 193, 198; Prinkey v. Baltimore & O. Rd. Co. (1914), 32 I. C. C. Rep. 32, 33; Hammerschmidt & Franzen Co. v. Chicago & N. W. Ry Co. (1914), 30 I. C. C. Rep. 71, 81; Seattle Shingle Co. v. Chicago, M. & St. P. Ry. Co. (1914), 30 I. C. C. Rep. 364, 367; Coal Rates from Virginia Mines (1914), 30 I. C. C. Rep. 635, 642; Kaufman Commercial Club v. Texas & N. O. Rd. Co. (1914), 31 I. C. C. Rep. 167, 170; Oklahoma Cottonseed Crushers Assn. v. Missouri, K. & T. Ry. Co. (1915), 35 I. C. C. Rep. 94, 106; Cape Girardeau Portland Cement Co. v. St. Louis & S. F. Rd. Co. (1915), 35 I. C. C. Rep. 109, 114; Brownsville Cotton Oil & Ice Co. v. Louisville & N. Rd. Co. (1915), 36 I. C. C. Rep. 401, 403; Scott v. Cape Charles Rd. Co. (1916), 38 I. C. C. Rep. 467, 471; Pardee Works v. Central Rd. of N. J. (1916), 39 I. C. C. Rep. 162, 165; Memphis Freight Bureau v. St. Louis, I. M. & S. Ry. Co. (1916), 39 I. C. C. Rep. 303, 308; State of Iowa v. Wabash Ry. Co. (1917), 46 I. C. C. Rep. 703, 709; National Tube Co. v. Lake Terminal Rd. Co. (1919), 55 I. C. C. Rep. 469; Utilities Development Corporation v. Pittsburgh, C. C. & St. L. Rd. Co. (1920), 56 I. C. C. Rep. 694; Dothan Chamber of Commerce v. Director General, Alabama G. S. Rd. Co. (1920), 58 I. C. C. Rep. 537; Cambrai Steel Co. v. Director General, as Agent, Northern P. Ry. Co. (1921), 60 I. C. C. Rep. 459; Holmes Hallowell Co. v. Great N. Ry. Co. (1921), 60 I. C. C. Rep. 687.

#### 609-YY. GRADUATED RATES.

The general rule contemplated by the Statute of equitably graduated charges on like traffic with reasonable reference to the amount of the service is just in itself, and commonly most beneficial both to the carriers and to the public, and is only to be departed from when justified by exceptional conditions, and in such instances no longer than the conditions require.<sup>1</sup>

The Commission in considering rates to Pacific Coast Terminals from points east of the Missouri River stated that nothing in the Act would prevent transcontinental lines from putting into effect, if they saw fit, a system of graded rates so that Chicago and other intermediate points would take lower rates to the Pacific Coast than points on the Atlantic seaboard.<sup>2</sup>

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1. Lehman, Higginson & Co. v. Southern P. Co. (1890), 3 I. C. Rep. 80, 4 I. C. C. Rep. 1.  
2. Business Men's League v. Atchison, T. & S. F. Ry. Co. (1902), 9 I. C. C. Rep. 318.

#### 609-ZZ. RATES ON MIXED CARLOADS

In *Lumber Rates from Southern Ry. Points to Eastern Points*,<sup>1</sup> a tariff rule provides as follows:

In the absence of specific commodity rates on mixed carload shipments of two or more kinds of lumber, freight charges shall be assessed on the basis of the highest carload rate contained in shipments, provided the total charges must not exceed charges arrived at by application of carload and minimum carload weight (actual if more than minimum) on any one kind of lumber, and less-than-carload rate on actual weight on other kinds.

Prior to the publication of the above rule a shipper was prevented from loading mixed carloads of different kinds of lumber taking different rates because no rate was in effect applicable to such a mixture. A rule of that nature, however, is general throughout the southeast and in other parts of the country, and is by no means uncommon when applied to other commodities than lumber. *Held*, That such rule is not objectionable.

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1. *Lumber Rates from Southern Railway Points to Eastern Points* (1914), 31 I. C. C. Rep. 244, 252; citing, Florida Fruit and Vegetable Shippers' Assn. v. Atlantic C. L. Rd. Co. (1910), 17 I. C. C. Rep. 552.

#### 609-AAA. PROPRIETY OF BRIDGE TOLLS OR RIVER-CROSSING CHARGES.

Charges for a bridge service may be determined upon a basis somewhat different from that employed in the construction of charges

at a crossing where the transfer is effected by barges or other floating equipment. In the former case the investment is relatively large and the fixed charges thereon usually constitute the chief item of expense, whereas in the latter case the investment is relatively small and the principal expenses are those incurred in operating the facility.<sup>1</sup>

The Commission has held that the expense of crossing a great river like the Missouri where the cost of constructing and maintaining a bridge may be equivalent to constructing and maintaining many miles of railway, is a valid reason for imposing a higher charge upon that traffic which must cross the river provided always that no discrimination results.<sup>2</sup>

In *Norman Lumber Co. v. Louisville & N. Rd. Co.*<sup>3</sup> the Commission stated: "However, in our opinion in the former *Norman Lumber Co.* case (22 I. C. C. Rep. 239), we expressly reserved for future consideration the question of bridge tolls and on page 247 use the following language:

"\* \* \* There can be no doubt that Louisville, on the south bank of the river, ought not to pay inbound rate which is sufficient to cover the transportation of traffic to the north bank of the river, and then, when reshipping the traffic to the north, again pay an amount sufficient to cover the transportation across the bridge. In other words, Louisville ought not to be considered on the north bank of the river on inbound shipments and on the south bank of the river on outbound shipments."

"It is evident that the conclusion expressed in the above quotation is correct. The problem before us is to fix the responsibility for Louisville's disadvantage and to suggest a remedy.

"At the hearing and in briefs and arguments complainants were inclined to place the blame upon carriers north of the river. They argue that the general tendency of carriers is to place cities on opposite banks of a river on the same basis. Complainants contend further that every point on the line receives the benefits which accrue from the existence of the bridge, and that the burden of constructing and maintaining an expensive bridge between two cities should not be imposed exclusively upon the traffic of those two cities or of either of them, but should be distributed just as the burden of constructing and maintaining any other link in the railroad system is distributed. In this connection, reference is made to our decision in *Traffic Bureau of Merchants' Exchange v. S. P. Co.*, 19 I. C. C. 259, 261, where we said:

"\* \* \* We do not recognize the right of a carrier to single out a piece of expensive road and make the local traffic thereon bear an undue portion of the expense of its maintenance or of its construction. A road is built and operated as a whole, and local rates are not to be made with respect to the difficulties of each particular portion, charging the cost of a bridge to the traffic of one section or the cost of a tunnel to traffic between its two mouths. Upon this same road millions of dollars have recently been expended in building the Lucin cut-off just west of Ogden, a monumental bit of construction which traverses the Great Salt Lake. If rates from one side of the lake to the other were based upon the cost of this cut-off they would be unconscionable. If the position of the defendant were followed by the carriers generally (which it is not, nor even by itself) it would result in rates that would vary from mile to mile as the cost of road per mile varies."

"It seems reasonable that a separate charge should not be assessed for crossing every costly bridge, and that ordinarily bridges must be regarded as a part of the entire system. That, however, is not necessarily true at all river crossings.

"Almost invariably where bridge tolls are added to the through rate, their explanation is historical. Railroads were built to and from the great rivers. Particularly the Mississippi and the Ohio served as

natural barriers at which railroads terminated and began. At first freight was unloaded at the river, and when destined to points beyond was ferried across and loaded again into the cars of the carrier on the opposite bank. Later either the cars themselves were ferried across or bridges were built. The latter are maintained either by a separate bridge company, which may be independent of the carriers serving the crossing or owned by them, or maintained by one of the carriers themselves. It is evident that no matter in whom the ownership may be, each carrier using the bridges should be required to contribute to its maintenance in proportion to the use made of it. The charges for bridges so maintained partake of the character of a fixed terminal charge. They should be based upon the cost of the service. If that be their basis, their diminution with the increased length of the haul would be improper. The question of the absorption of the charge then becomes one of policy with the carrier and it may absorb or not, so long as the alternative adopted does not place an undue burden upon a shipper or locality. In *Railroad Commission of Iowa v. I. C. R. R. Co.*, 20 I. C. C., 181, 188, it was urged that a bridge a mile long ought to be regarded as simply a mile of the carrier's track, and ought not to be the foundation for any separate or higher charge. Upon this point we said:

"\* \* \* This, however, is not the generally accepted view. By reason of the great cost of such structures a bridge has been regarded more or less generally as adding a constructive mileage to the carrier's line for which an additional charge may be exacted. Moreover, bridges are ordinarily built and operated by separate companies, although, not infrequently, as in this case, the bridge companies are owned by the carrier or carriers that use the bridge. As a rule, the accounts of the bridge companies are kept separately and the rights of the owning carrier or carriers to use the bridge and the compensation therefor are established and controlled, as in this instance, by formal contract. The compensation is ordinarily fixed in the form of a definite toll per passenger and sometimes a more or less definite charge is assessed on freight. The carriers usually lay the burden upon the traveling and shipping public by adding the tolls to their regular fares and rates, and these additional charges have been recognized by the Commission. *Freight Bureau of Cincinnati Chamber of Commerce v. C., N. O. & T. P. Ry. Co.*, 7 I. C. C. 180; *Commercial Club v. C. & N. W. Ry. Co.*, 7 I. C. C. 386.

"In *Freight Bureau of Cincinnati v. C., N. O. & T. P. Ry. Co.*, 7 I. C. C., 180, Cincinnati shippers objected to differentials against them and in favor of Louisville on southbound shipments. One of the defenses of the differential was that 'The location of Cincinnati upon the north bank of the Ohio River subjected its traffic to an additional charge in crossing the river.' On this branch of the case we said:

"We think the location of Cincinnati upon the north bank of the Ohio River justifies, to some extent, a differential against her as to territory south of that river.

"In view of all these considerations we do not believe that, in so far as competition with Cincinnati is concerned, the maintenance of rates from Louisville to central freight association territory which reflect the bridge toll for crossing the Ohio River and which in consequence thereof are 1 cent higher than rates from Cincinnati to equidistant points constitutes an undue discrimination against Louisville."

The Commission has uniformly held that rates must be so made as to avoid discrimination; that if a bridge toll is charged at one crossing it should be charged at all crossings; that if a bridge toll is absorbed at one crossing it should be absorbed at all crossings; that a transit privilege granted at one point on the Ohio River should also be accorded under substantially similar conditions at a competitive point.<sup>4</sup>

In *Manufacturers & Merchants Assn. of New Albany, Ind. v. Aberdeen & A. Rd. Co.*<sup>5</sup> the Commission said: "We are therefore of opin-

ion and find, considering all the facts, circumstances, and conditions appearing, that in maintaining from the territory south of the Ohio and Potomac and east of the Mississippi rivers, and on lumber from Arkansas, rates to Cairo, Ill., Evansville, Ind., and Cincinnati, Ohio, on the north bank of the Ohio River, which include no toll or charge for the bridge service from either East Cairo, Ky., Henderson, Ky., Covington or Newport, Ky., on the south bank of that river, while contemporaneously maintaining from the same points of origin to New Albany, Ind., on the north bank of said river, rates higher than to Louisville, Ky., on said south bank, by the amount of the bridge toll or charge, defendants are subjecting complainants and shippers of New Albany, Ind., to undue and unreasonable prejudices and disadvantages from which an order will be entered to cease and desist."

Carriers should either charge a bridge toll on traffic in both directions at every competitive crossing or not charge it at any crossing.<sup>6</sup>

In *Constructive Mileage for Bridge over Hudson River at Poughkeepsie, N. Y.*<sup>7</sup> the proposal in respondent's distance tariff to add 100 constructive miles for crossing the Hudson River by bridge at Poughkeepsie, N. Y., found not justified.

1. Memphis-Southwestern Investigation (1919), 55 I. C. C. Rep. 515, 552.
2. Edwards & Bradford Lumber Co. v. Chicago B. & Q. Rd. Co. (1912), 25 I. C. C. Rep. 93, 96.
3. Norman Lumber Co. v. Louisville & N. Rd. Co. (1914), 29 I. C. C. Rep. 565, 568.
4. Paducah Board of Trade v. Chicago, B. & Q. Rd. Co. (1916), 37 I. C. C. Rep. 743, 751; citing, Norman Lumber Co. v. Louisville & N. Rd. Co. (1912), 22 I. C. C. Rep. 239; Manufacturers & Merchants' Assn. of New Albany, Ind. v. Aberdeen & A. Rd. Co. (1912), 24 I. C. C. Rep. 331; Manufacturers & Merchants' Assn. of New Albany, Ind. v. Aberdeen & A. Rd. Co. (1912), 25 I. C. C. Rep. 116; Norman Lumber Co. v. Louisville & N. Rd. Co. (1914), 29 I. C. C. Rep. 565; Paducah Board of Trade v. Illinois C. Rd. Co. (1914), 29 I. C. C. Rep. 583; Paducah Board of Trade v. Illinois C. Rd. Co. (1914), 29 I. C. C. Rep. 593; Metropolis Commercial Club v. Illinois C. Rd. Co. (1914), 30 I. C. C. Rep. 40; Rates on Lumber from Southern Points to the Ohio River Crossings and Other Points (1915), 34 I. C. C. Rep. 652; Henderson Commercial Club v. Illinois C. Rd. Co. (1915), 36 I. C. C. Rep. 20. The Interstate Commerce Commission has considered the propriety of bridge tolls or river-crossing charges in the following cases in addition to the above: Freight Bureau of the Cincinnati Chamber of Commerce v. Cincinnati, N. O. & T. P. Ry. Co. (1897), 7 I. C. C. Rep. 180; Commercial Club of Omaha v. Chicago & N. W. Ry. Co. (1897), 7 I. C. C. Rep. 386; Anthony v. Philadelphia & R. Ry. Co. (1908), 14 I. C. C. Rep. 581; Board of Railroad Commissioners of Iowa v. Illinois C. Rd. Co. (1911), 20 I. C. C. Rep. 181; Edwards & Bradford Lumber Co. v. Chicago B. & Q. Rd. Co. (1912), 25 I. C. C. Rep. 93; East Dubuque Supply Co. v. Illinois C. Rd. Co. (1913), 28 I. C. C. Rep. 425; Rock Spring Distilling Co. v. Illinois C. Rd. Co. (1914), 29 I. C. C. Rep. 18; Manufacturers & Merchants' Assn. of New Albany, Ind. v. Aberdeen & A. Rd. Co. (1915), 37 I. C. C. Rep. 350; Paducah Board of Trade v. Chicago B. & Q. Rd. Co. (1916), 37 I. C. C. Rep. 743, 750; City of Memphis v. Chicago, R. I. & P. Ry. Co. (1917), 43 I. C. C. Rep. 121, 126; Natchez Chamber of Commerce v. Louisiana & A. Ry. (1919), 52 I. C. C. Rep. 105, 125; Cairo Assn. of Commerce v. Butler County Rd. Co. (1921), 60 I. C. C. Rep. 519.
5. Manufacturers & Merchants' Assn. of New Albany, Ind. v. Aberdeen & A. Rd. Co. (1912), 24 I. C. C. Rep. 331, 339; affirmed, Manufacturers & Merchants' Assn. of New Albany, Ind. v. Aberdeen & A. Rd. Co. (1912), 25 I. C. C. Rep. 116 and 37 I. C. C. Rep. 350.
6. Paducah Board of Trade v. Illinois C. Rd. Co. (1914), 29 I. C. C. Rep. 583, 588; cited, Paducah Board of Trade v. Illinois C. Rd. Co. (1914), 29 I. C. C. Rep. 593, 597.
7. Constructive Mileage for Bridge over Hudson River at Poughkeepsie, N. Y. (1922), 66 I. C. C. Rep. 230.

#### 609-BBB. RESHIPPING RATES

A reshipping or rebilling rate is a proportional rate under which after a commodity has been shipped to a distributing market and unloaded for the purpose of storage or treatment in transit, the same com-

modity or an equivalent amount may be reshipped to final destination. There is a close analogy between reshipping rates and transit. The reshipping rate is usually less than the local rate from the distributing or transit point to the final destination and must be regarded as part of the through rate or charge from the point of origin through the transit point to the ultimate destination.<sup>1</sup>

When the through rate or charge is made up of separately established rates or charges applicable to the through business, the through rate or charge must be attacked as violative of the act, although the violation may be believed to be occasioned by a particular factor or factors thereof; in such case the complainant should be prepared at the hearing to prove unlawfulness of the through rate itself and that this is due to a particular factor or factors.<sup>2</sup>

Proportional rates are necessarily parts of through rates and differ from local rates used as parts of through rates in that before the proportional rate may be attacked at all there must be an allegation that the through rate is unreasonable because of the unreasonableness of the particular proportional rate; whereas local rates, as such, may be attacked separately when used separately.<sup>3</sup>

In *Cairo Board of Trade v. Cleveland C. C. & St. L. Ry. Co.*<sup>4</sup> the Commission stated: "In determining whether or not complainant has been damaged by the exaction of unreasonable or unduly preferential reshipping rates the total through charges paid from point of origin must be considered. But this does not hold true of a determination of the reasonableness or justness of the reshipping rate itself. Reshipping rates are not merely divisions of through rates, but are separately established rates generally published by carriers other than those engaged in the inbound movement and without the concurrence of the latter; and the point of reshipment is a rate-breaking point. A change in the reshipping rates, even though it may affect the through charges, will have no effect upon the inbound rates. The reasonableness of such inbound rates is in no manner contingent upon reshipping rates. Furthermore, inbound rates used in connection with reshipping rates generally serve also as local rates. Hence they are subject to review independently of the outbound rates. An excessive reshipping rate might produce a reasonable through charge in connection with an unduly low inbound rate and vice versa. It cannot properly be argued that a proposal to increase unremunerative reshipping rates could be denied upon the ground that the through charge composed of an excessive inbound rate and the unremunerative reshipping rate is just and reasonable. The converse must also be true, namely, that shippers may not upon like ground be denied relief from unreasonable or unduly prejudicial reshipping rates. This is also true as to proportional rates that are applicable to shipments going to or from beyond and which are not limited as applying only on shipments from or to designated points or territory. Each of such rates must be judged upon its individual merits.

"Defendants argue that the application of reshipping rates from Chicago, Peoria, St. Louis, and other points is the result of competitive influences, and that since these rates are made with relation to the Chicago rates they are influenced by the water competition felt at Chicago. The futility of this argument is evident when it is considered

that at all of the points accorded reshipping rates the sum of the inbound rates plus the reshipping rates outbound is identical with the through rate from the grain-producing region west of the Mississippi River to the eastern destinations, and furthermore that it is the universal practice to accord transit under the through rates wherever necessary at points along the direct line of movement. At points so located defendants must either equalize in and out rates by means of reshipping rates or provide transit under through rates. *In re Transportation of Wool, Hides, and Pelts*, 23 I. C. C., 151; *Southern Illinois Millers' Asso. v. L. & N. R. R. Co.*, 23 I. C. C., 672; *Missouri-River Illinois Wheat and Flour Rates*, 27 I. C. C., 286; *Fabrication in Transit Charges*, 29 I. C. C., 70; *Henderson Commercial Club v. I. C. R. R. Co.*, 36 I. C. C., 20."

In *Buffalo Grain Cases*<sup>5</sup> the Interstate Commerce Commission stated: "In *Toledo Produce Exchange v. A. A. R. R. Co.*, 27 I. C. C., 536, 541, where it was shown that Toledo possessed all the attributes of a rate-breaking point, and therefore was asking for reshipping rates, we took occasion to point out that the line of demarcation between the so-called rate-breaking points and other points was not always natural or real, but purely artificial and arbitrary. Many grain centers are now rate-breaking points because the carriers have made them so by giving them reshipping rates and not because of special characteristics which do not exist at other points.

"On the other hand, many centers possessing all the attributes of rate-breaking points have been denied reshipping rates. Even Chicago, the largest grain market in this country, was not a rate-breaking point in the full sense of that term until the year 1910, when, by the joint action of the carriers, including the defendants here, reshipping rates were made on grain and its products from that point. If, because of special characteristics, a market is entitled to reshipping rates, Buffalo should have them. Aside, however, from the question of the right of a grain market to have reshipping rates, and aside from the measure of the rates into and out of the rate-breaking points, it is obvious that such a system is more simple, easier of application, and less subject to abuse than any system involving transit arrangements with their attending complexities and difficulties of enforcement.

"Upon the evidence before us in respect of this question we conclude and find that Buffalo and its dealers in grain and grain products are subjected to undue prejudice by the failure of the defendant carriers to maintain *ex rail* reshipping rates on grain and grain products, both domestic and export, while such rates are contemporaneously in effect from Chicago, Cleveland, Sandusky, Toledo, and Detroit."

In *Toledo Produce Exchange v. Ann Arbor Rd. Co.*<sup>6</sup> the Commission stated: "One of the objections which through lines have from time to time raised against the establishment of reshipping rates is that such rates would deprive them of traffic to which they are fairly entitled. The theory of this objection is that the objecting lines originate the traffic and that therefore they are entitled to the outbound haul. If the reshipping rates are established, the outbound haul may be taken away from them by competing carriers; therefore, they prefer through rates with transit arrangements, which serve as a sort of lien on this traffic. Generally speaking, we think this attitude on the part of a car-

rier toward traffic which it originates is quite proper. As a matter of everyday fairness, a carrier should not be needlessly deprived of traffic which it originates. However, this doctrine can be carried too far. It is sometimes urged with a persistence and dogmatic intolerance suggestive of an attempt to apply the feudal theory to modern transportation. As we have said before, we fully recognize the right of a carrier to get the long haul out of the traffic which it originates; but this right is strictly subordinate to the public interest, and when its assertion results in unreasonable and unjust rates or restrictions on the conduct of business it cannot be approved."

See "*Transit Privileges, Facilities and Regulations,*" Chapter 13, *post.*

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1. Cairo Board of Trade v. Cleveland C. C. & St. L. Ry. Co. (1917), 46 I. C. C. Rep. 343, 348.
  2. Stevens Grocer Co. v. St. Louis, I. M. & S. Ry. Co. (1916), 42 I. C. C. Rep. 396, 398; citing, Commercial Club of Omaha v. Anderson & S. R. Ry. Co. (1913), 27 I. C. C. Rep. 302; Scott-Mayer Commission Co. v. Chicago, R. I. & P. Ry. Co. (1915), 28 I. C. C. Rep. 529; Poehlman Bros. Co. v. Chicago, M. & St. P. Ry. Co. (1914), 30 I. C. C. Rep. 89.
  3. Stevens Grocer Co. case, *supra*; cited in, Cairo Board of Trade v. Cleveland C. C. & St. L. Ry. Co. (1917), 46 I. C. C. Rep. 343, 350.
  4. Cairo Board of Trade v. Cleveland C. C. & St. L. Ry. Co. (1917), 46 I. C. C. Rep. 343, 350.
  5. Buffalo Grain Cases: Buffalo Chamber of Commerce v. Buffalo Creek Rd. Co. (1917), 46 I. C. C. Rep. 570, 582, and Buffalo Chamber of Commerce v. Baltimore & O. Rd. Co. (1917), 46 I. C. C. Rep. 570, 582.
  6. Toledo Produce Exchange v. Ann Arbor Rd. Co. (1913), 27 I. C. C. Rep. 536, 543.

#### 609-CCC. RATES ON BRANCH-LINE HAULS

Rates on a branch line of railroad may lawfully be higher than on a main line through well developed territory where the density of the traffic is much greater.<sup>1</sup> It is necessary that carriers be permitted to charge rates on branch lines that are fully compensatory for the service they perform so long as they are not unreasonable.<sup>2</sup> Circumstances and conditions are different at main-line points than at branch-line points.<sup>3</sup>

There is material difference between a reasonable amount to be added for additional mileage on a straight-away-long haul and a reasonable allowance to be added for an out-of-line haul which involves two and probably three terminal services.<sup>4</sup>

A new line is not required to establish as low a rate as a more firmly established road.<sup>5</sup> Rates on a branch line on traffic coming in over another line may be higher than on the main line.<sup>6</sup> The Commission does not feel justified in requiring a newly-constructed line with a comparatively meagre traffic to join in the establishment of rates on a particular commodity as well as those applying from points located on the rails of carriers more firmly established.<sup>7</sup>

While carriers are justified within proper limits in making somewhat higher rates to branch-line points than to main-line points where the same rate is applied to all points, both on main and branch lines, it is to be tested as a whole.<sup>8</sup> The fact that a rate is made applicable to certain destinations irrespective of whether most of them are located on branch lines does not justify an unreasonable rate to any of the destinations involved, but the reasonableness of the rate is to be tested

as a whole.<sup>9</sup> Commission rates are usually the same for all lines, both main lines and branches. It is fair that the main line should in a degree contribute to the support of the branch line for the branch-line business, when it reaches the main line, is surplus traffic from which a larger profit is made. It is in the public interest that rates shall be so adjusted that the population and industries may freely diffuse themselves. In determining the reasonableness of rates upon the main line based upon earnings, reference must be made to the earnings of branch lines which contribute to it.<sup>10</sup>

That rates on other parts of the carrier's system are forced down by competition to a very low point, does not justify a higher rate to a point located on a branch line, since such point is entitled to the reasonable rate which its location and other advantages dictate without taking into account conditions which bring about lower rates to other points.<sup>11</sup>

What might perhaps have been proper as between companies operating separate and distinct short lines may become unreasonable and unjust when both are absorbed by a large system which serves an extensive territory.<sup>12</sup>

It is almost axiomatic that rates cannot be made so as to give high earnings to a poorly placed, indifferently operated, or isolated road without making rates extortionate.<sup>13</sup>

To what extent shippers on an original and main line should bear increased burdens due to the construction of an additional or branch line must depend upon the particular circumstances in each case; no general rule can be formulated.<sup>14</sup>

Profit on a particular division is not controlling, as the incidental benefit to other portions of the system may more than offset any loss upon the particular division.<sup>15</sup> An originating division would apparently not be self-supporting any more than would the average large terminal in the city.<sup>16</sup> The carrier cannot claim the right to earn a net profit from every mile section or other part into which the road might be divided.<sup>17</sup>

Under a system of graded mileage rates it would be just and reasonable to make rates higher from the branch-line points than from the junction, but under a system of group rates based on average distances and average operating conditions there is no dissimilarity of conditions sufficiently great to justify the addition of an arbitrary at these points.<sup>18</sup>

In a number of cases the Commission has required the extension of the junction point rates to points on branch and connecting lines where it appeared that the carriers had adopted such carriers with respect to other points similarly located and circumstanced.<sup>19</sup>

See "*Railway Finances—Guaranteed Return on Railway Property,*" Chapter 55, post, and "*Aggregate value of the railway property of the carrier held for and used in the service of transportation,*" Section 608-X, ante.

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1. Commercial Club of Omaha v. Chicago & N. W. Ry. Co. (1910), 19 I. C. C. Rep. 156, 159; League of Southern Idaho Commercial Clubs v. Oregon S. L. Rd. Co. (1910), 18 I. C. C. Rep. 562, 564; Santa Rosa Traffic Assn. v. Southern P. Co. (1912), 24 I.

- C. C. Rep. 46, 48; Board of Trade of Winston-Salem, N. C. v. Norfolk & W. Ry. Co. (1913), 26 I. C. C. Rep. 146, 147, 151; Memphis Freight Bureau v. Illinois C. Rd. Co. (1913), 27 I. C. C. Rep. 507, 511.
2. Morgan Grain Co. v. Atlantic C. L. Rd. Co. (1910), 19 I. C. C. Rep. 460, 471.
  3. Board of Trade of Winston-Salem N. C. v. Norfolk & W. Ry. Co. (1909), 16 I. C. C. Rep. 12, 18.
  4. Kansas City Transportation Bureau v. Atchison, T. & S. F. Ry. Co. (1909), 15 I. C. C. Rep. 491, 495.
  5. Du Mee, Son & Co. v. Alabama, T. N. Rd. Co. (1910), 19 I. C. C. Rep. 575, 576.
  6. Acme Cement Plaster Co. v. Chicago & N. W. Ry. Co. (1910), 18 I. C. C. Rep. 105, 106.
  7. DuMee, Son & Co. v. Alabama, T. & N. Rd. Co., *supra*.
  8. League of Southern Idaho Commercial Clubs v. Oregon S. L. Rd. Co. (1910), 18 I. C. C. Rep. 562, 564.
  9. Ibid.
  10. Receivers and Shippers' Assn. of Cincinnati v. Cincinnati N. O. & T. P. Ry. Co. (1910), 18 I. C. C. Rep. 440, 465.
  11. Board of Trade of Winston-Salem v. Norfolk & W. Ry. Co. (1909), 16 I. C. C. Rep. 12, 16.
  12. Black Mountain Coal Land Co. v. Southern Ry. Co. (1909), 15 I. C. C. Rep. 286.
  13. In Re Investigation of Advances in Rates by Carriers in Western Trunk Line, Trans-Missouri, and Illinois Freight Committee Territories (1911), 20 I. C. C. Rep. 307, 377.
  14. Florida E. C. Ry. Co. v. United States (1912), 200 Fed. Rep. 797, 805.
  15. Louisville & N. Rd. Coal & Coke Rates (1913), 26 I. C. C. Rep. 20, 29.
  16. Ibid.
  17. Ibid.
  18. Western Petroleum Refineries Assn. v. Director General, Atchison, T. & S. F. Ry. Co. (1920), 59 I. C. C. Rep. 38, 41.
  19. Caron & Campbell v. Director General, as Agent, Chicago, R. I. & P. Ry. Co. (1920), 57 I. C. C. Rep. 474, 478; Fish Oil, Carloads, St. Marys, Ga. to Ohio and Mississippi River Crossings (1921), 60 I. C. C. Rep. 511, 514.

**609-DDD. ESTABLISHMENT OF COMMODITY RATE AS EVIDENCE OF THE UNREASONABLENESS OF A PRIOR CLASS RATE.**

In *National Refining Co. v. Missouri K. & T. Ry. Co.*<sup>1</sup> the rate of 36 cents which was applied on refined oil between Muskogee and Coffeyville was the fifth-class rate and was applicable only because no commodity rate on refined oil had been established between these points. The Commission held that the unreasonableness of the class rate of 36 cents was clearly indicated by the fact that a few months later, one of the routes established a commodity rate of 17 cents less than one-half of the class rate, and the other route maintained a 17-cent rate to points much more distant than Coffeyville.

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1. *National Refining Co. v. Missouri K. & T. Ry. Co.* (1912), 23 I. C. C. Rep. 527, 530.

**609-EEE. THE PUBLISHED RATE SCHEDULE IS *prima facie* EVIDENCE OF THE REASONABLENESS OF THE RATES STATED THEREIN.**

It is the intent of the Act that the schedule of rates required to be adopted, printed and posted by the carrier, in accordance with section 6, shall be the basis for determining whether a given rate exacted from a shipper is or is not unreasonable.<sup>1</sup>

The carriers' published schedule of rates is, *prima facie*, the criterion by which the reasonableness of a given charge must be judged.<sup>2</sup>

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1. *Van Patton v. Chicago M. & St. P. Ry. Co.* (1897), 81 Fed. Rep. 845.  
 2. *Kimavey v. Terminal Rd. Assn. of St. Louis* (1897), 81 Fed Rep. 802.

**609-FFF. FILING RATE SCHEDULE WITH INTERSTATE COMMERCE COMMISSION IS NOT CONCLUSIVE OF THE REASONABLENESS OF THE RATES CONTAINED THEREIN.**

The United States Supreme Court has held that no *presumption of law* exists that a freight rate upon a particular commodity is reasonably low because such rate has been duly published and filed by the carrier with the Interstate Commerce Commission.<sup>1</sup>

However, the published rate governing interstate transportation between two given points, so long as it remains uncancelled, is as fixed and unalterable either by the shipper or by the carrier as if that particular rate had been established by a special act of Congress. When regularly published, it is no longer the rate imposed by the carrier, but the rate imposed by the law. It therefore, is the obligation of the carrier to collect and of the shipper or consignee to pay the lawfully published tariff rate on an interstate shipment, regardless of its reasonableness or unreasonableness. For a full discussion of this subject, see "*Contracts between Carriers and Shippers and Others*," chapter 15, *post*, and "*Payment for Transportation*," Chapter 19, *post*.

The fact that a rate is published and filed in accordance with the Act raises no such presumption of reasonableness as will preclude inquiry into that question by the Interstate Commerce Commission.<sup>2</sup>

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1. Illinois C. Rd. Co. v. Interstate Commerce Commission (1907), 206 U. S. 441, 51 L. Ed. 1128, 27 Sup. Ct. Rep. 700, holding order of the Interstate Commerce Commission to be valid and directing carriers to comply therewith. Central Yellow Pine Assn. v. Illinois C. Rd. Co. (1905), 10 I. C. C. Rep. 505. See also San Bernardino Board of Trade v. Atchison, T. & S. F. Ry. Co. (1890), 3 I. C. C. Rep. 138, 4 I. C. C. Rep. 104; McMorran v. Grand Trunk Ry. Co. (1889), 3 I. C. C. Rep. 252, 261, 2 I. C. Rep. 604; Knudson-Ferguson Fruit Co. v. Michigan C. Rd. Co. (1906), 148 Fed. Rep. 958, 79 C. C. A. 46; Poor Grain Co. v. Chicago B. & Q. Rd. Co. (1907), 12 I. C. C. Rep. 418; Rather & Co. v. Nashville C. & St. L. Ry. Co. (Tenn. 1915), 174 S. W. 1113, 1114.
  2. Illinois C. Rd. Co. v. Interstate Commerce Commission, *supra*.

**609-GGG. MAINTENANCE FOR A LONG PERIOD OF A RATE VOLUNTARY ESTABLISHED BY THE CARRIER AS EVIDENCE OF ITS REASONABLENESS.**

The Commission has often said that where a rate is voluntarily established and maintained for a considerable period this fact, although not conclusive, is strong evidence of the reasonableness of the rate. The force of this presumption is greatly weakened and might be altogether destroyed by the circumstances under which the rate was established and maintained; but if no particular reason is shown for the putting in of the rate, if no commercial or competitive condition prevents the maintenance of a higher rate, if, in other words, the maintenance of the rate has been *voluntary* upon the part of the carrier, the force of the admission becomes exceeding strong.<sup>1</sup>

The Commission has often held that where, upon the strength of a given rate, capital has been invested and industrial conditions have become established, the rate cannot be discontinued without taking into account its effect upon these commercial and industrial conditions, but it has never said that there was any absolute rule requiring for any reason the indefinite continuance of such a rate. It is always a question of what, under all circumstances, is just and reasonable.<sup>2</sup>

In *Eastern Fruit Growers' Assn. v. Baltimore & O. Rd. Co.*<sup>3</sup> the Commission said: "They rely upon extensive rate tables and contend primarily that the commercial exigencies of the growers, the maintenance of the same rates for many years, despite changed conditions, and signal increase in tonnage, demand the cooperation and assistance of the carriers. They disclaim any purpose to have the Commission regulate the rates merely to enable them to market their apples at a profit, but the unmistakable tone of the testimony is to the contrary.

"This record does not establish fundamental error or injustice in the percentage system prevailing in the east, which we have heretofore had occasion to approve, or convince us that the relativity of the adjustments from the complaining territory and from the east is unjustly discriminatory to complainants. In *A. T. & S. F. Ry. Co. v. I. C. C.*, 190, Fed. 591, it was said, at page 594.

"The authority granted it under section 15 of the Act to Regulate Commerce, to prescribe reasonable rates when it shall be of opinion that the rates fixed by carriers are unreasonable, does not confer absolute or arbitrary power to act on any considerations which the Commission may deem best for the public, the shipper, and the carrier. Its orders must be based on transportation considerations. While it may give weight to all factors bearing either on the cost or the value of the transportation services, it must disregard as well the demand of the shipper for protection from legitimate competition, domestic or foreign, for unlimited markets or for the enforcement of equitable estoppels arising from a justifiable expectation that past rates will be maintained as the demand for the carrier for the maximum under which the traffic will move freely.'

"In *Stuarts Draft Milling Co. v. S. Ry. Co.*, 31 I. C. C. 623, we stated, at page 625:

"The present adjustment is one of long standing, and it should be here observed that if the long maintenance of rates raises a presumption of reasonableness which is to be given weight in opposition to proposed increases by the carriers it must also be forceful in considering reductions."

"And at page 631:

"Nor will we require carriers to modify an existing arrangement of rates long in effect and apparently fairly adapted to the needs of the communities and interstate affected, except upon substantial proof of its unreasonableness or of unjustifiable injury resulting therefrom."

The presumption of reasonableness arising from long existence of a rate does not necessarily attach when the rate was established by the carrier, in the exercise of its discretion to meet competitive conditions.<sup>4</sup>

In *Interstate Commerce Commission v. Louisville & N. Rd. Co.*<sup>5</sup> the Supreme Court held that an order of the Interstate Commerce Commission restoring an old local rate which had been raised by the carrier in order to make the sum of the locals equal the through rate, and making a corresponding reduction in such through rate, cannot be said to have been made without any substantial evidence to support it, where there was conflicting evidence as to the justice of the new rates in themselves and by comparison with others and as to the reasonableness of the old rates, which had remained in fact for some years after the water competition originally compelling them had disappeared.

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I. Burgess v. Transcontinental Freight Bureau (1908), 13 I. C. C. Rep. 668, 677; Darling & Co. v. Baltimore & O. Rd. Co. (1909), 15 I. C. C. Rep. 79, 80; Railroad Commission of Florida v. Savannah F. & W. Rd. Co. (1891), 5 I. C. C. Rep. 13, 3 I. C. Rep. 688; Holmes & Co. v. Southern Ry. Co. (1900), 8 I. C. C. Rep. 561; National Hay Assn. v. Lake Shore & M. S. Ry. Co. (1902), 9 I. C. C. Rep. 264, 305; Procter & Gamble Co. v. Cincinnati H. & D. Ry. Co. (1903), 9 I. C. C. Rep. 440, 490. Defendants ordered to discontinue their practice from charging more than fourth-class rates on

less-than-carload shipments of common soap. An advance to third-class or to 20% less than third-class was held to be unreasonable. *Interstate Commerce Commission v. Cincinnati, H. & D. Ry. Co.* (1905), 146 Fed. Rep. 559. Commission's order held to be valid. Carriers directed to comply therewith. *Cincinnati, H. & D. Ry. Co. v. Interstate Commerce Commission* (1907), 206 U. S. 142, 51 L. Ed. 995, 27 Sup. Ct. Rep. 648. Commission's order held to be valid. Carriers directed to comply therewith. *Central Yellow Pine Assn. v. Illinois C. Rd. Co.* (1905), 10 I. C. C. Rep. 505; *Tift v. Southern Ry. Co.* (1905), 10 I. C. C. Rep. 548; *Warren Mfg. Co. v. Southern Ry. Co.* (1907), 12 I. C. C. Rep. 381; *Quimby v. Clyde S. S. Co.* (1907), 12 I. C. C. Rep. 392; *Boise Commercial Club v. Adams Express Co.* (1909), 17 I. C. C. Rep., 115, 121; *Bartles Oil Co. v. Chicago, M. & St. P. Ry. Co.* (1909), 17 I. C. C. Rep. 146, 148; *Memphis Cotton Oil Co. v. Illinois C. Rd. Co.* (1909), 17 I. C. C. Rep. 313, 318; *Clark Co. v. Buffalo & S. Ry. Co.* (1910), 18 I. C. C. Rep. 380, 381; *Millar v. New York C. & H. R. Rd. Co.* (1910), 19 I. C. C. Rep. 78; *Gamble-Robinson Commission Co. v. St. Louis & S. F. Rd. Co.* (1910), 19 I. C. C. Rep. 114; *Morgan Grain Co. v. Atlantic C. L. Rd. Co.* (1910), 19 I. C. C. Rep. 460, 468; *Pabst Brewing Co. v. Chicago, M. & St. P. Ry. Co.* (1910), 19 I. C. C. Rep. 584, 586, 587; *Arlington Heights Fruit Exchange v. Southern P. Co.* (1911), 22 I. C. C. Rep. 149, 151; *Fairmont Creamery Co. v. Chicago, B. & Q. Rd. Co.* (1912), 22 I. C. C. Rep. 252, 254; *Chattanooga Feed Co. v. Alabama G. S. Rd. Co.* (1912), 22 I. C. C. Rep. 480, 484; *Chamber of Commerce of the State of New York v. New York C. & H. R. Rd. Co.* (1912), 24 I. C. C. Rep. 55, 74; *Dupont De Nemours Powder Co. v. Central Rd. Co. of New Jersey* (1912), 25 I. C. C. Rep. 19, 20; Advances on Ground Iron Ore from Points in Alabama, Georgia, and Tennessee to Boston, New York, Philadelphia and Other Points (1913), 26 I. C. C. Rep. 675, 676; Grain Rates to Pittsburgh, Pa. (1914), 30 I. C. C. Rep. 382, 383, 384; *Topeka Traffic Assn. v. Alabama & V. Ry. Co.* (1914), 30 I. C. C. Rep. 510, 515; *Augusta Cotton Exchange and Board of Trade v. Southern Ry. Co.* (1914), 30 I. C. C. Rep. 704, 706; *Nix & Co. v. Southern Ry. Co.* (1914), 31 I. C. C. Rep. 145, 149; Lumber Rates from Southern Railway points to eastern points (1914), 31 I. C. C. Rep. 244, 253; freight rates between points in Minnesota via Interstate Routes and Between Points in Minnesota and Other States (1914), 32 I. C. C. Rep. 361, 364; *Anaconda Copper Mining Co. v. Director General, Ann Arbor Rd. Co.* (1920), 57 I. C. C. Rep. 723, 729.

2. *Green Bay Business Men's Assn. v. Baltimore & O. Rd. Co.* (1909), 15 I. C. C. Rep. 59, 63.
3. *Eastern Fruit Growers' Assn. v. Baltimore & O. Rd. Co.* (1915), 33 I. C. C. Rep. 343, 353.
4. *Hill & Co. v. Southern Ry. Co.* (1911), 20 I. C. C. Rep. 225; citing, *Lindsay Bros. v. Baltimore & O. Rd. Co.* (1909), 16 I. C. C. Rep. 6; *Commercial Club of Omaha v. Southern Ry. Co.* (1911), 20 I. C. C. Rep. 631, 636.
5. *Interstate Commerce Commission v. Louisville & N. Rd. Co.* (1913), 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. Rep. 185. This case is known as the New Orleans Board of Trade Case, the history of which is as follows: *New Orleans Board of Trade, Ltd. v. Louisville & N. Rd. Co.* (1909), 17 I. C. C. Rep. 231. Carriers ordered to reduce to a specified amount their class rates from New Orleans, La., to Mobile, Ala., and Pensacola, Fla., on the ground that the present rates are unreasonable. *Louisville & N. Rd. Co. v. Interstate Commerce Commission* (1910), (C. C. W. D. Ky.), 184 Fed. Rep. 118. Preliminary injunction against enforcement of Commission's order denied. Bill to annul Commission's order transferred to Commerce Court. *Louisville & N. Rd. Co. v. Interstate Commerce Commission*, *supra*. Commission's order held invalid on the ground that there was no basis for the Commission to hold that the existing rates were unreasonable. *Interstate Commerce Commission v. Louisville & N. Rd. Co.* (1913), 227 U. S. 88, *supra*. Commission's order held to be valid in all respects.

#### 609-HHH. PRESUMPTION WHERE LONG-ESTABLISHED RATE IS ADVANCED FOR A SHORT PERIOD AND THEN REDUCED TO THE FORMER BASIS.

Where carriers voluntarily make a rate between certain points for a long period of time the presumption is that such rate is reasonable, and where a long-established rate is raised for a short period and then voluntarily reduced to the former basis the presumption is that the advanced rate is unreasonable, but this presumption may be overcome by proof to the contrary.<sup>1</sup>

In the case of *Commercial Club of Omaha v. Southern P. Co.*<sup>2</sup> the Commission stated: "It will suffice to say that an order granting affirmative relief, and particularly in a case in which reparation is awarded, must always be predicated upon a definite conviction, drawn from the record or from our own investigation or from both, that the

rate exacted on shipments embraced within the complaint was an unreasonable rate."

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1. Sunderland Bros. Co. v. Pere Marquette Rd. Co. (1909), 16 I. C. C. Rep. 450.
  2. Commercial Club of Omaha v. Southern P. Co. (1910), 18 I. C. C. Rep. 53.

#### 609-III. UNREASONABLE RATE NOT PERMISSIBLE MERELY BECAUSE ITS CORRECTION WILL RESULT IN THE DISTURBANCE OF OTHER RATES.

An unreasonable rate may not be permitted to stand merely because if reduced other readjustments might follow. Whatever the carriers might do in this respect the duty of the Interstate Commerce Commission in each case is to inquire into the reasonableness and justness of the rate under immediate consideration.<sup>1</sup>

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1. New Orleans Board of Trade, Ltd. v. Louisville & N. Rd. Co. (1912), 23 I. C. C. Rep. 429, 431.

#### 609-JJJ. RIGHT OF CARRIER TO CHANGE AN UNREASONABLY LOW RATE

It is the duty of the Interstate Commerce Commission, in passing on the reasonableness of a rate, to consider the conditions affecting the welfare of both shippers and carriers; but the carrier is not to be denied the right to change from an unreasonably low rate, which has formerly prevailed, to a just and reasonable charge in the future, merely because of the injurious consequences which would result to shippers from a change in the rate.<sup>1</sup>

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1. McLean Lumber Co. v. United States (1916), 237 Fed. Rep. 460.

#### 609-KKK. NO ESTOPPEL OPERATES AGAINST THE RIGHT OF A CARRIER TO ENJOY JUST AND REASONABLE RATES.

In *Southern P. Co. v. Interstate Commerce Commission*<sup>1</sup> the United States Supreme Court held that an order of the Commission setting aside new rates on lumber from Willamette valley points to San Francisco and bay points, and restoring substantially the old rates, is void as beyond its powers, where, from the record and the opinion of the Commission, and from the express exclusion of Portland from the benefit of the reduced rate, and the reasons assigned for such exclusion, it is clear that the Commission was not exercising its authority to condemn unjust and unreasonable rates and fix reasonable ones, but was acting upon the assumption that it has the right to protect the lumber interests from the consequences of a change in rates, even if the change was from a rate which had been fixed unreasonably low, for the purpose of encouraging the industry, to a higher rate which is not in itself unjust or unreasonable.

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1. Southern P. Co. v. Interstate Commerce Commission (1911), 219 U. S. 433, 443, 31 Sup. Ct. Rep. 288, 55 L. Ed. 283. Willamette Valley Lumber Case: *Western Oregon Lumber Manufacturers' Assn. v. Southern P. Co.* (1908), 14 I. C. C. Rep. 61. Carriers ordered to reduce to a specified amount an advanced rate on rough, green, fir lumber from Willamette Valley, Ore., to San Francisco, Calif., on the ground that such rate is unreasonable. *Southern P. Co. v. Interstate Commerce Commission* (C. C. N. D. Cal.) Case undecided. Certified to Supreme Court, because trial court was divided on the merits. *Southern P. Co. v. Interstate Commerce Commission*

(1909), 215 U. S. 226, 30 Sup. Ct. Rep. 89, 54 L. Ed. 169. Certificate dismissed and case remanded to Circuit Court. Southern P. Co. v. Interstate Commerce Commission (1910), 177 Fed. Rep. 963. Commission's order held to be valid. Southern P. Co. v. Interstate Commerce Commission (1911), 219 U. S. 433, 55 L. Ed. 283, 31 Sup. Ct. Rep. 288. Commission's order held to be invalid on the ground that it was based on the assumed power of the Commission to prevent railroad companies from raising their rate on the theory that they were estopped to advance such rate on account of having maintained it for a considerable period. Such power, it was held, has not been conferred upon the Commission. Oregon & Washington Lumber Manufacturers' Assn. v. Southern P. Co. (1911), 21 I. C. C. Rep. 389. Excluding the element of estoppel from consideration, the Commission again ordered the carriers to reduce to a specified amount the advanced rate on rough, green, fir lumber from Willamette Valley, Ore., to San Francisco, Cal., on the ground that such a rate was unreasonable. Southern P. Co. v. United States (1912), 197 Fed. Rep. 167. Commission's order held to be valid. Southern P. Co. v. United States (1914), 232 U. S. 736, 34 Sup. Ct. Rep. 605, 58 L. Ed. 820. Dismissed on motion of appellants.

#### 609-LLL. BURDEN OF PROOF UNDER ALLEGATION OF UNREASONABLENESS.

An allegation that a rate is unreasonable puts the burden of showing such unreasonableness on the complainant.<sup>1</sup>

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1. Chamber of Commerce of the City of Augusta, Ga. v. Southern Ry. Co. (1912), 22 I. C. C. Rep. 233, 234; Loftus v. Pullman Co. (1910), 19 I. C. C. Rep. 102, 103.

#### 609-MMM. Onus probandi AS TO REASONABLENESS OF INCREASED RATE ON THE COMMON CARRIER.

Section 15 (7) of the Interstate Commerce Act (*as amended June 18, 1910*), provides that at any hearing involving a rate increased after January first, nineteen hundred and ten, or of a rate sought to be increased after the passage of that amendment, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier, and that the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.<sup>1</sup>

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1. Section 15 (7) of Interstate Commerce Act.

#### 609-NNN. PRESUMPTION THAT CARRIER'S TARIFF PROVIDES REASONABLE CHARGES FOR THE SERVICES NORMALLY PERFORMED.

The carrier's tariff rates are presumed to provide reasonable charges for the services ordinarily or normally required and performed. If the shipper or receiver demands an additional service the carrier has a right to assess a reasonable charge therefor. If, because of the nature or condition of the shipper's freight, it becomes necessary or appropriate to require extra precautions in connection with such shipments, which precautions impose upon the carrier additional service it is entitled to a reasonable compensation for that extra service. All such charges in addition to being reasonable, must of course, be free from unjust discrimination.<sup>1</sup>

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1. New Orleans Live Stock Exchange, Ltd. v. Louisville & N. Rd. Co. (1914), 31 I. C. C. Rep. 609, 612.

#### 609-OOO. VOLUNTARY REDUCTION OF A RATE BY THE CARRIER IS NOT CONCLUSIVE EVIDENCE THAT THE PRIOR RATE WAS UNREASONABLE.

The voluntary reduction of a rate by the carrier is not of itself sufficient evidence that the prior rate was unreasonable.<sup>1</sup> In *Virginia*

*Iron, Coal & Coke Co. v. Director General, Southern Ry. Co.*,<sup>2</sup> the Commission stated: "They assert that while what the carriers have done in the past may not be conclusive in measuring the reasonableness of rates, it is persuasive, and that our determination here, while not to be controlled by, must give full consideration, to, commercial effects and the injury to a business built and operated upon the faith of continuance of special rates. It should be said that if there is disability of location with respect to raw materials it is curable by complainants, but not by the adjustment of rates at the hands of this Commission in disregard of their reasonableness. The fact that admittedly low rates claimed now to have been less than compensatory were permitted to continue for a long period of time does not of itself preclude increases therein; and while a presumption of reasonableness may ordinarily attach to rates long maintained there is no lawful foreclosure of the right to rebut that presumption.

"The principles governing have been announced by us in many cases, including the following:

"However reluctant the Commission may feel to sanction changes in rates which tend to impair or destroy the value of investments made in expectation of their continuance, it cannot on that ground deny to carriers the right to charge rates which are just and reasonable. *Chattanooga Log Rates*, 35 I. C. C., 163, 168.

"We said in *Board of Railroad Commissioners of Kansas v. A. T. & S. F. Ry. Co.*, 22 I. C. C. 407, 410: 'A narrowing market, increased cost of production, overproduction, and many other conditions may render an industry unprofitable, without showing the freight rate to be unreasonable,' and we repeatedly held that it was no part of our duty to so adjust rates as to enable any industry to do business at a profit, to equalize market conditions, or to overcome disadvantages not arising from a violation of the statute. *Page Milling Co. v. N. & W. Ry. Co.*, 30 I. C. C., 605, 612."

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1. *Omaha Grain Exchange v. Mobile & O. Rd. Co.* (1915), 37 I. C. C. Rep. 363, 354; *Seaboard By-Products Coke Co. v. Director General, Philadelphia & R. Ry. Co.* (1920), 59 I. C. C. Rep. 35; *St. Bernard Compress Co. v. Director General, as Agent, New Orleans & N. E. Rd. Co.* (1920), 59 I. C. C. Rep. 232, 233; *Rath Packing Co. v. Director General, Illinois C. Rd. Co.* (1920), 59 I. C. C. Rep. 427.
  2. *Virginia Iron, Coal & Coke Co. v. Director General, Southern Ry. Co.* (1919), 53 I. C. C. Rep. 583, 588.

#### 609-PPP. THE FACT THAT A RATE ESTABLISHED BY A CARRIER DOES NOT APPLY between THE SAME POINTS IS NOT CONCLUSIVE OF ITS UNREASONABLENESS.

It has often been recognized by the Commission that the mere fact that a rate is higher one way between the same points than it is the other way does not prove that the higher rate is unreasonable. And this is particularly true where there is a preponderance of empty cars moving in one direction.<sup>1</sup>

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1. *Louisville & N. Rd. Co. v. Interstate Commerce Commission* (1912), 195 Fed. Rep. 541, 559; citing, *Duncan v. Atchison, T. & S. F. Ry. Co.* (1893), 6 I. C. C. Rep. 85, 103; *MacLoon v. Boston & M. Rd. Co.* (1903), 9 I. C. C. Rep. 642; *Weil v. Pennsylvania Rd. Co.* (1906), 11 I. C. C. Rep. 627.

#### 609-QQQ. DOUBT AS TO REASONABLENESS OF RATE SHOULD BE RESOLVED IN FAVOR OF THE CARRIER.

Broadly speaking, railways are entitled to impose rates which will maintain their properties in condition to properly discharge the functions which they undertake and to yield a fair return to their owners. In consideration of the fact that the public has permitted, and in some sense induced these companies to undertake this *quasi* public duty, instead of discharging it itself, where serious doubt exists

as to the reasonableness of a rate, the railway should be given the benefit of that doubt. But this does not mean that railway charges are subject to no revision nor that they can never be reduced except upon an absolute certainty.<sup>1</sup>

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1. Mayor and City Council of Wichita, Kansas v. Atchison, T. & S. F. Ry. Co. (1903), 9 I. C. C. Rep. 534, 553.

#### 609-RRR. RAILWAY-MAIL PAY.

The space-basis system to govern the transportation of the mails of the country by railroad which was inaugurated by the Act of July 28, 1916, 39 Stat. L. 412, 425, 431, was found fair and reasonable, and its extension to all mail routes required. Rules also prescribed with respect to authorization designed to simplify and make definite the procedure by the Post Office Department.<sup>1</sup>

The space-basis system to govern the transportation of mails by electric railroads found fair and reasonable.<sup>2</sup>

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1. Railway-Mail Pay (1919), 56 I. C. C. Rep. 1. This report contains interesting history of the railway-mail pay legislation and divides the mail service into five kinds or classes:
    1. Full railway-post-office-car service;
    2. Storage-car service;
    3. Apartment-post-office-car service;
    4. Storage-space service;
    5. Closed-pouch service.

See also Thirty-fourth Annual Report of Interstate Commerce Commission to Congress (1920, p. 73).

2. Electric Railway Mail Pay (1920), 58 I. C. C. Rep. 455.

#### 609-SSS. COMPENSATION TO CERTAIN LAND-GRANT ROADS.

Section 208 (C) of the Transportation Act of February 28, 1920, provides as follows:

Any land grant railroad organized under the Act of July 28, 1866 (Chapter 300), shall receive the same compensation for transportation of property and troops of the United States as is paid to land grant railroads organized under the Land Grant Act of March 3, 1863, and the Act of July 28, 1866 (Chapter 278).

The personal effects of an army officer are not the property of the United States, and, therefore, when transported for the government over land-grant railroads are not entitled to land-grant deductions, but are subject to commercial or regular tariff rates.<sup>1</sup>

The right of the land-grant railroad to recover from the United States the difference between its commercial or general tariff rates and the land-grant rates charged and accepted by it for the transportation for the government of the personal effects of army officers is lost by the carrier's long acquiescence in the government's explicit assertion that the land-grant rates were the proper ones for such service.<sup>2</sup>

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1. Oregon-Washington Rd. & Nav. Co. v. United States (1921), 65 L. Ed. 427, \_\_\_\_ U. S. \_\_\_\_, \_\_\_\_ Sup. Ct. Rep. \_\_\_\_.
  2. Ibid.

#### 609-TTT. ERRORS IN PUBLICATION OF RATES.

A carrier should not be penalized for a purely technical omission or error made in an effort to bring its tariff in conformity with the Commission's regulations.<sup>1</sup>

An "erroneous" rate repeatedly published, and upon which considerable traffic has moved for upward of two years, does not stand upon the basis of ordinary "error."<sup>2</sup> A claim of mistake in the publication of rates which remain in effect for as long a period as two years is not persuasive. The rate will be regarded as voluntarily and knowingly made. Errors should be discovered and eliminated within a reasonable time.<sup>3</sup>

The mere insertion in the tariff of an erroneous concurrence number will not invalidate the rates shown therein.<sup>4</sup>

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1. Highland Park Mfg. Co. v. Southern Ry. Co. (1913), 26 I. C. C. Rep. 67, 69.
  2. In the Matter of the Investigation and Suspension of Advances in Rates by Carriers for the Transportation of Linseed Oil Cake, Linseed Oil Meal, and Flaxseed Screenings in Carloads from Minneapolis and St. Paul, Minn., to Galveston, Tex., and other Gulf Ports (1913), 27 I. C. C. Rep. 246, 247.
  3. Reshipping Rates on Grain and Grain Products from Omaha, Nebr., and Other Points to Chicago & A. Rd. Co. Stations in Illinois and Missouri (1915), 32 I. C. C. Rep. 590, 591; Wausau Advancement Assn. v. Chicago & N. W. Ry. Co. (1913), 28 I. C. C. Rep. 459, 460.
  4. Bartlett Co. v. Chicago P. & St. L. Ry. Co. Unreported Opinion A-203.

#### 609-UUU. BASING-POINT SYSTEM OF RATES.

The system of rate making, commonly known as the "basing point" or "trade center" system, which was prevalent throughout the south at the time the Interstate Commerce Act took effect, is described as follows: Certain large cities and towns situated on the coast, at interior river points, and at railroad junctions are called competitive and receive quite low rates on all interstate traffic; all other stations are called local and are charged much higher rates. The rates at local points are made by adding to the competitive rate at the nearest competitive point the local from that point. These local rates are ascertained upon a short distance mileage basis, frequently using the table established or approved by the State railroad commissioners. The intermediate or local stations are "given the benefit" of what is called the lowest combination—that is, if the rate to the competitive point, plus the local rate to the given point beyond, exceeds the rate to the next competitive point plus the local rate back to the given point, the latter rate is taken.<sup>1</sup>

The basing-point system of rates, so generally employed by carriers in the territory south of the Ohio and Potomac and east of the Mississippi rivers, under which rates to the basing points, generally commercial centers, were lower than to intermediate points on the same lines, was condemned by the fourth section of the original act. As this section, under the construction given it by the Supreme Court of the United States, did not prove efficacious in correcting the evils sought to be corrected by it, the Congress under the 1910 amendment, laid an absolute inhibition upon a departure from the long-and-short-haul rule, subject only to the exception that the Commission might in special cases authorize a departure from this rule.<sup>2</sup>

In *Board of Trade of Carrollton v. Central of Georgia Ry. Co.*<sup>3</sup> the Commission stated: "Whatever may be said in justification of the basing-point system, we do not think that the basing-point system itself necessarily requires that joint through rates over long distances to local or noncompetitive points should now be made by adding to the

basing-point rates either the full locals or high differentials. Stated in other words, for fear of misapprehension, we do not wish to be understood as passing upon the reasonableness of the local rates from the various basing points to points of ultimate destination when applied to local service; neither do we wish to be understood as condemning the application of differentials lower than such locals in the making of joint through rates beyond or intermediate to such basing points; what we do say is: that, in the making of joint through rates on long distance traffic, to local or noncompetitive points, the differentials above the rates to the basing points should bear some reasonable relation to the total distances involved; and that where the long-haul traffic to local stations is meager these differentials may perhaps be higher than otherwise they would be."

For a full treatment of the application of the long-and-short-haul clause of the Act to the basing-point system of rate making, see "*Fourth Section of the Act to Regulate Commerce—Long-and-Short-Haul Clause—Fourth Section Applications,*" Chapter 7, post.

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1. *Harwell v. Columbus & W. Rd. Co.* (1887), 1 I. C. C. Rep. 236, 1 I. C. C. Rep. 631; *Davenport v. Southern Ry. Co.* (1906), 11 I. C. C. Rep. 650; *Board of Trade of the City of Hampton, Fla., v. Nashville, C. & St. L. Ry. Co.* (1900), 8 I. C. C. Rep. 503. See also, *In Re Louisville & N. Rd. Co.* (1887), 1 I. C. C. Rep. 84, 1 I. C. C. Rep. 278; *Martin v. Chicago B. & Q. Rd. Co.* (1888), 2 I. C. C. Rep. 46, 2 I. C. C. Rep. 32; *In Re Tariffs and Classifications of Atlanta & W. P. Rd. Co.* (1889), 3 I. C. C. Rep. 24, 2 I. C. Rep. 461; *Charlotte Shippers' Assn. v. Southern Ry. Co.* (1905), 11 I. C. C. Rep. 108; *Columbia Grocery Co. v. Louisville & N. Rd. Co.* (1910), 18 I. C. C. Rep. 502, 505; *Mayor and City Council of Vienna, Ga. v. Georgia S. & F. Ry. Co.* (1913), 28 I. C. C. Rep. 173, 174; *Columbia Chamber of Commerce v. Southern Ry. Co.* (1913), 28 I. C. C. Rep. 339, 344; *Texarkana Freight Bureau v. St. Louis, I. M. & S. Ry. Co.* (1913), 28 I. C. C. Rep. 569, 571.
  2. *Green v. Alabama & V. Ry. Co.* (1917), 43 I. C. C. Rep. 662, 677.
  3. *Board of Trade of Carrollton v. Central of Georgia Ry. Co.* (1913), 28 I. C. C. Rep. 154, 165.

#### 609-VVV. EFFECT OF PRIVATE AGREEMENT BETWEEN CARRIER AND SHIPPER CONCERNING TRANSPORTATION CHARGES ON QUESTION OF REASONABLENESS OF RATE.

In case of *Hood & Sons v. Delaware & H. Co.*<sup>1</sup> the Commission said: "The Commission has no authority to approve or enforce a private agreement made between shippers and carriers concerning charges for transportation, nor is it bound by such agreement when the reasonableness of such charges are challenged in the mode prescribed in the Act. It follows *a fortiori* that the Commission will not undertake to interpret or construe an agreement not to determine its legal effect, not to say that a tariff shall be issued in compliance therewith. The force and effect of such agreements as fixing obligations between the parties thereto are to be determined by the Courts, but under our rules of practice they may be regarded and used as evidence so far as pertinent to questions which the Commission may determine, and it is desirable that the facts be thus agreed upon whenever practicable. When the parties thereto agree upon a rate, said agreement may be regarded as an admission as between the parties executing it of strong evidentiary value that the rate agreed upon is reasonable, and such evidence will be considered by the Commission together with all other facts, circumstances, and conditions that they may reasonably apply to the matters under investigation, keeping in view all interests involved, and its duty to establish just and reasonable rates available for all shippers alike without dis-

crimination in favor of any particular shipper by reason of an agreement with the carrier.

"On the other hand the Commission is expressly authorized and empowered to pass upon the reasonableness of a charge for transportation or the reasonableness of any regulation or practice affecting such charge, expressed in a tariff issued by any carrier subject to the provisions of the Act. The rates charged and collected must be in accordance with the tariff legally effective whether in compliance with a private agreement with the shipper or not, and the Commission must, therefore, look to the provisions of the tariff, to ascertain the rate that has been challenged or the reasonableness of any regulations or practices affecting such rates, and to determine and prescribe upon consideration of all the evidence what will be a reasonable charge to be thereafter observed and what regulation or practice is fair to be thereafter followed.

"Where the language of a tariff is ambiguous in its specifications, and when there is a reasonable doubt as to its true import and meaning, the agreement may be examined and employed as a medium of explanation of the tariff to remove the ambiguity."

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1. Hood & Sons v. Delaware & H. Co. (1909), 17 I. C. C. Rep. 1.

#### 609-WWW. EQUALIZING RATES IN AND OUT OF COMPETING JOBBING CENTERS IMPRACTICABLE.

The Commission has held that the construction of rates by equalizing the rates in and out of competing jobbing centers is impracticable, even if it might be assumed that the rate factors necessary to bring about such equalization would always be fair and reasonable.<sup>1</sup>

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1. Wheeler Lumber Bridge & Supply Co. v. Director General, Chicago G. W. Rd. Co. (1920), 59 I. C. C. Rep. 6, 10, citing Hutchinson Traffic Bureau v. Chicago, R. I. & P. Ry. Co. (1917), 40 I. C. C. Rep. 689; Fort Dodge Commercial Club v. Director General, Cedar Rapids & Iowa City Ry. Co. (1921), 60 I. C. C. Rep. 224, 227.

#### 609-XXX. THE CHARGING OF AN UNREASONABLE RATE IS A TORT.

In the case of *International Nickel Co. v. Director General, as Agent, Grand Trunk Ry. Co. of Canada*<sup>1</sup> the Commission stated: "The charging of an unreasonable rate is a tort, *Southern Pac. Co. v. Darnell Taenzer Co.*, 245 U. S. 531, 534, and the parties to such a rate are jointly and severally liable for any resulting damage. *Nicola, Stone & Myers Co. v. L. & N. R. R. Co.*, 14 I. C. C. 199; *Atlantic & Pacific Railroad v. Laird*, 164 U. S. 393, 399.

"Section 1 (5) of the Interstate Commerce act provides:

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"All charges made for any service rendered or to be rendered in the transportation of passengers or property \* \* \* or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful \* \* \*.

"Section 8 of the act provides:

"That in any case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful \* \* \* such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act \* \* \* (Italics ours)."

*See "Damages and Reparation-Claims between Shippers and Carriers," Chapter 28, post.*

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1. International Nickel Co. v. Director General, as Agent, Grand Trunk Ry. Co. of Canada (1922), 66 I. C. C. Rep. 627, 628.

**609-YYY. LOWER RATE ON INLAND MOVEMENT OF IMPORT OR EXPORT TRAFFIC THAN ON DOMESTIC COMMERCE, UNLAWFUL UNLESS WATER MOVEMENT SHALL HAVE BEEN OR IS TO BE IN A VESSEL DOCUMENTED UNDER THE LAWS OF THE UNITED STATES.**

Section 28 of the *Merchant Marine Act*<sup>1</sup> reads as follows:

That no common carrier shall charge, collect or receive, for transportation subject to the Interstate Commerce Act, of persons or property, under any joint rate, fare, or charge, or under any export, import, or other proportional rate, fare, or charge, which is based in whole or in part on the fact that the persons or property affected thereby is to be transported to, or has been transported from, any port in the possession or dependency of the United States, or in a foreign country, by a carrier by water in foreign commerce, any lower rate, fare or charge than that charged, collected, or received by it for the transportation of persons, or of a like kind of property, for the same distance, in the same direction, and over the same route, in connection with commerce wholly within the United States, unless the vessel so transporting such persons or property is, or unless it was at the time of such transportation by water, documented under the laws of the United States. Whenever the board is of the opinion, however, that adequate shipping facilities to or from any port in a possession or dependency of the United States or a foreign country are not afforded by vessels so documented, it shall certify this fact to the Interstate Commerce Commission, and the commission may, by order, suspend the operation of the provisions of this section with respect to the rates, fares, and charges for the transportation by rail of persons and property transported from, or to be transported, to such ports, for such length of time and under such terms and conditions as it may prescribe in such order, or in any order supplemental thereto. Such suspension of operation of the provisions of this section may be terminated by order of the commission whenever the board is of the opinion that adequate shipping facilities by such vessels to such ports are afforded and shall so certify to the commission.

In its thirty-fifth annual report to Congress<sup>2</sup> the Interstate Commerce Commission stated:

"Section 28 of the merchant marine act, 1920, provides that no lower rate, fare, or charge shall be charged, collected, or received for the transportation within the United States of persons or property in foreign commerce than is charged for like transportation in domestic commerce, unless the water transportation from or to the port of export or import shall have been or is to be in a vessel documented under the laws of the United States. It also authorizes us, upon the certification of the Shipping Board that adequate shipping facilities are not afforded by vessels documented under the laws of the United States, to suspend the operation of the provisions of this section, and to terminate the suspension upon further certification of the Shipping Board that adequate facilities are so afforded. Upon appropriate certifications received from the Board we have suspended the operation of the provisions of this section indefinitely."

"The effect which the operation of section 28 may have upon the flow of commerce through different ports, and the possible resultant injury to some ports, merit the serious consideration of the Congress. Rail carriers, in making export or import rates, frequently group the ports in a given region, such, for instance, as the gulf region, and the lowest domestic rate to or from any port in the group upon the particular description of traffic under consideration is published as the export or import rate on that traffic to or from all ports within the group. The grouping is of benefit to shippers as well as to the

ports affected, each one of which is nearer to some points of origin, and more distant from others, than any of the other ports. It follows that between certain origins and certain ports export or import and domestic rates are on a substantial parity. Even in the absence of such grouping the difference between the export or import and domestic rates to and from various ports is materially greater in some instances than in others. When section 28 becomes operative it is probable that export and import shipments moving in foreign vessels will seek the ports having the lowest domestic rates and at these ports foreign vessels will be able to compete upon practically equal terms with the United States vessels. The ultimate effect of section 28 may be merely to divert traffic from certain ports to others with little or no gain in tonnage for United States vessels.

"The adequacy or inadequacy of shipping facilities afforded by vessels documented under the laws of the United States may vary from time to time dependent upon market conditions and the hazards of operation. It may become desirable, when adequate shipping facilities at particular ports are afforded by vessels so documented, to terminate the suspension of the operation of section 28 with respect to those ports but not as to others. Subsequent developments may make renewed suspension necessary. The construction and maintenance of port facilities are costly, and if the use of ports is to be made variable and shifting under the operation of this section that cost will be reflected in varying proportions in the charges to be borne by the shipping public.

"Another aspect also merits careful consideration. A large part of our exports of grain, for example, move by rail under transit arrangements which permit of elevation, storing, grading, or other treatment within a limited period, as for instance, 12 months, at the transit point, and forwarding on the balance of the through rate in effect at the time and from the place of original movement. If section 28, now suspended, should become operative shipments of grain could thereafter be carried in the same train from the same elevator to the same port for the same foreign vessel, on some of which the balance of the through export rate, which was in effect perhaps a year before, will be collected, and on other of which the higher domestic rate must be collected. If for some cause the suspension should be renewed, grain which had left the country elevator while section 28 was operative would still take the domestic rate from the transit point and grain originally shipped during the new suspension would take the export rate, although moving together from the same market to the same port for the same foreign vessel. The difficulty of policing such situations will be great. Moreover, grain dealers at primary markets name prices to foreign purchasers on grain delivered at the port. The purchasers arrange for the vessel and the dealer can not tell, in naming his price, whether or not a foreign vessel will be selected by the purchaser. Obviously the dealers' risk of loss will be great, and the effect upon commerce most prejudicial.

"In our judgment the Congress should take such action with respect to this section as may be necessary to obviate unnecessary conflict with the needs and usages of inland transportation."

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1. 41st Stat. L. 999.

2. Thirty-Fifth Annual Report of I. C. C. (1921), p. 13, 14.

## 610. COMPARISON OF FREIGHT RATES

## 610-A. NECESSITY FOR COMPARISON OF RATES.

The terms "reasonable and just," "unreasonable or unjust," "undue or unreasonable preference or advantage," "undue or unreasonable prejudice or disadvantage in any respect whatsoever," and "unjust discrimination," as used in the statute, imply comparison, and rates must bear just relation to each other as well as to be reasonable *per se*.<sup>1</sup>

A rate can seldom be considered "in and of itself." It must be taken almost invariably in relation to and in connection with other rates. The freight rates of this country, both upon different commodities and between different localities, are largely interdependent, and it is the fact that they do not bear a proper relation to one another, rather than the fact that they are absolutely too low or too high, which most often gives occasion for complaint.<sup>2</sup> Rates can seldom be tested even as to their reasonableness, strictly by themselves, but must be considered to an extent in reference to their environment.<sup>3</sup>

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1. *Page v. Delaware L. & W. Rd. Co.* (1896), 6 I. C. C. Rep. 548, 556; citing, *Eau Claire Board of Trade v. Chicago, M. & St. P. Ry. Co.* (1892), 4 I. C. Rep. 65, 5 I. C. C. Rep. 264; *James & Abbott v. Canadian P. Rd. Co.* (1893), 4 I. C. Rep. 274, 5 I. C. C. Rep. 612; *Raymond v. Chicago, M. & St. P. Ry. Co.* (1887), 1 I. C. Rep. 627, 1 I. C. C. Rep. 230; *Boards of Trade Union v. Chicago, M. and St. P. Ry. Co.* (1887), 1 I. C. Rep. 608, 1 I. C. C. Rep. 215; *Interstate Commerce Commission v. Texas & P. Ry. Co.* (1893), 57 Fed. Rep. 948, 6 C. C. A. 653, 4 I. C. Rep. 408. *Page v. Delaware L. & W. Rd. Co.* (1894), 6 I. C. C. Rep. 148. Carriers ordered to cease charging a higher rate on window shades than on window hollands and shade cloth, on the ground that the existing classification is unreasonable; *Interstate Commerce Commission v. Delaware L. & W. Rd. Co.* (1894), 64 Fed Rep. 723. Commission's order held to be invalid on the ground that the Commission erred in ignoring the element of value in fixing the same rate on all articles of a certain kind, some of which are worth \$3.00 and others \$10.00; thus denying to the carrier a remuneration for the additional risk in the case of articles of greater value. Upon a certificate from the Commission stating, in substance, that the Commission did not intend to make this order as broad as its terms import, a rehearing was denied on the ground that the court cannot substitute for an order actually made such an order as the Commission might or should make or such an order as the Commission intended to make. No appeal; *Page v. Delaware L. & W. Rd. Co.* (1896), 6 I. C. C. Rep. 548. Upon rehearing, the Commission entered a new order containing the same general requirements, but with a proviso permitting the carriers to restrict the application of the reduced rates to window shades of a certain value. Subsequently the original order was substantially complied with by the lines directly interested. (*Senate Hearings, Committee on Interstate Commerce, 1904-5*, vol. 5, p. 315).
  2. *Tileston Milling Co. v. Northern P. Ry. Co.* (1899), 8 I. C. C. Rep. 346.
  3. *Southwestern Missouri Millers' Club v. Missouri, K. & T. Ry. Co.* (1912), 22 I. C. C. Rep. 422, 427.

## 610-B. FACTS TO BE CONSIDERED IN COMPARING RATES.

In the case of *Louisville & N. Rd. Co. v. United States*<sup>1</sup> the Supreme Court of the United States, per Mr. Justice Lamar, stated: "While some elements of value are fixed, the market price of property and work is affected by so many and such varying factors as to make it impossible to lay down a rule by which to determine what any article or service is worth. But one of the most common measures by which to value the property or service of A is to compare it with the amount charged for the same thing by B, C and D. But this method, if made the sole basis for ascertaining values, may often lead to improper results. For B, C and D may charge too much, or they may have been

forced to charge too little. The same is true of determining, by comparison, the reasonableness of freight charges. Until some standard is adopted they may prove nothing—even where two hauls are over the same mileage. For the rate attacked may tend to show that the others are too low—while they in turn might be relied on to prove that the first is too high. Both may be unreasonably low, or too low, because compelled by conditions over which the carrier had no control. Water competition, rail competition, and competition of markets, enter so largely into the establishment of rates that mere distance is not necessarily a determining factor; indeed, the statute itself recognizes that there may be circumstances under which it is lawful to charge less for a long haul than for a short haul over the same road. But while all this be true, it is, nevertheless, a fact that a comparison of rates between two points on the same road, or with the charges on other roads, may furnish evidence of probative value.

"Giving the widest possible effect to the fact that mere comparison between rates does not necessarily tend to establish the reasonableness of either, it is still true that, when one of many rates is found to be higher than all others, there may arise a presumption that the single rate is high. And when to that is added the fact that some of the comparative and lower rates had been prescribed by the Commission, there was at least a *prima facie* standard, which, after allowing for dissimilarity in conditions, might be used along with all the other evidence in order to test the reasonableness of the Nashville rate. No one of these facts was conclusive, for the character of the country through which the two roads had been built might differ, but nevertheless what was shown to be a reasonable rate on one, might, after allowing for the dissimilarity in conditions, earnings, and cost, be a factor in determining the reasonableness of the rate on the other."

When rate comparisons are offered in evidence in substantiation of a claim of unreasonableness, they should be accompanied by such testimony as is possible showing the transportation circumstances and conditions incident thereto.<sup>2</sup>

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1. Louisville & N. Rd. Co. v. United States (1915), 238 U. S. 1, 35 Sup. Ct. Rep. 696, 59 L. Ed. 1177; affirming, Louisville & N. Rd. Co. v. United States (1914), 216 Fed. Rep. 672; refusing to enjoin that portion of the Commission's order relating to switching practices in Traffic Bureau of Nashville, Tenn., v. Louisville & N. Rd. Co. (1913), 28 I. C. C. Rep. 533.
  2. Lehigh Portland Cement Co. v. Baltimore & O. S. Rd. Co. (1915), 35 I. C. C. Rep. 14, 20.

#### 610-C. COMPARISON OF RATES ON DIFFERENT BRANCHES OR LINES OF THE SAME CARRIER.

Where the reasonableness of rates is in question, comparison may be made with the rates on different branches or lines of the same carrier; the value of the comparison being dependent in all cases upon the *degree* of similarity of circumstances and conditions attending the transportation for which the rates compared are charged.<sup>1</sup>

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1. Freight Bureau of Cincinnati v. Cincinnati, N. O. & T. P. Ry. Co. (1894), 6 I. C. C. Rep. 195, 4 I. C. Rep. 592; Morrell v. Union P. Ry. Co. (1893), 6 I. C. C. Rep. 121, 4 I. C. Rep. 469.

**610-D. COMPARISON OF RATES VIA COMPETING LINES.**

It does not follow as a matter of law that rates should be the same for the same distance over two different roads.<sup>1</sup>

Transportation rates in force on lines of rival carriers are entitled to consideration in connection with the question of reasonable charges for transportation services rendered under like conditions.<sup>2</sup>

A rate via one route is not shown to be unreasonable by the mere fact that there is a lower rate via another route.<sup>3</sup>

While, however, it is competent to compare rates and distances on different roads in dealing with an alleged unreasonable rate these are to be considered in connection with the many other factors that enter into the adjustment of rates.<sup>4</sup>

The fact that the agent of the carrier advised the route longer than another possible route, and which charged a higher route is immaterial in an inquiry as to the reasonableness of the rate charges.<sup>5</sup>

No presumption of unreasonableness attaches to a joint rate applicable over one route, which is higher than the combination of locals via another route.<sup>6</sup>

Where two routes are available, it is unfair to consider only the cost via the more expensive route, and when such higher cost is due to betterments and improvements under way, the expenditures for which were undoubtedly made to reduce the cost of operation, such cost figures are not representative.<sup>7</sup>

It cannot be said that the rate established by a short line is necessarily excessive simply because it is no lower than a rate previously in effect via a longer line, for it is possible that the rate via the longer line was sufficiently low to warrant its adoption as a reasonable rate via the shorter line, and the traffic density of the new line must also be taken into account.<sup>8</sup> A carrier with a long route is not obliged as a matter of law to meet the rate of its short line competitors, and the reduction of a rate applicable via a long route to meet the rate in effect via a shorter and more direct one is not of itself conclusive evidence of the unreasonableness of the higher rate.<sup>9</sup>

Because the delivering carrier sees fit to state that it will protect a rate made by a competitor, but fails to do so, the Commission cannot hold that such lower rate is necessarily reasonable.<sup>10</sup> In *Iola Portland Cement Co. v. Missouri, K. & T. Rd. Co.*<sup>11</sup> the complainants shipped cement from Iola, Tex., to Comanche, Hasse, Brady and Stephensville, Tex. Shipments moved over the M. K. & T. R. R. and F. W. & R. G. R. R. Lawful combinations were assessed. At the same time there was a through route via the Santa Fe and the F. W. & R. G. R. Rs., with a joint rate less than the combination charged. Joint rate was known to complainant. No evidence was offered that the rates assessed were unreasonable and the only reason suggested for giving the traffic to the M. K. & T. R. R., was an alleged assumption that the latter road would be able to "protect" the rate published over another route. Held, it to be obvious that such a state of facts cannot be made the basis of an award of reparation under the Act, as such a result would

be in substance an entire perversion of the fundamental provision of the statute in respect to the publication of rates and adherence thereto.

1. Interstate Commerce Commission v. Union P. Rd. Co. (1912), 222 U. S. 541, 549, 32 Sup. Ct. Rep. 106, 56 L. Ed. 308.
2. Morrell v. Union P. Ry. Co. (1893), 6 I. C. C. Rep. 121, 4 I. C. Rep. 469.
3. Ball Lumber Co. v. Texas & P. Ry. Co. (1912), 25 I. C. C. Rep. 437, 438; Carstens Packing Co. v. Union P. Rd. Co. (1911), 22 I. C. C. Rep. 8, 10; McLean Lumber Co. v. Louisville & N. Rd. Co. (1912), 22 I. C. C. Rep. 349, 352; Ryland & Brooks Lumber Co. v. Chesapeake & O. Ry. Co. (1911), 21 I. C. C. Rep. 520, 521; Cook Co. v. Wabash Rd. Co. (1911), 21 I. C. C. Rep. 563, 564; Delray Salt Co. v. Michigan C. Rd. Co. (1910), 18 I. C. C. Rep. 247; Southern Cotton Oil Co. v. Atlantic C. L. Rd. Co. (1910), 18 I. C. C. Rep. 275, 276; Colorado Bedding Co. v. Chicago, B. & Q. Rd. Co., (1910), 18 I. C. C. Rep. 403, 404; Ohio Iron & Metal Co. v. Wabash Rd. Co. (1910), 18 I. C. C. Rep. 299, 300; Pankey & Holmes v. Central N. E. Ry. Co. (1910), 18 I. C. C. Rep. 578; South Canon Coal Co. v. Colorado & S. Ry. Co. (1909), 17 I. C. C. Rep. 286; Menefee Lumber Co. v. Texas & P. Ry. Co. (1909), 15 I. C. C. Rep. 49, 51; Palmer & Miller v. Lake E. & W. Rd. Co. (1909), 15 I. C. C. Rep. 107.
4. Cannon v. Mobile & O. Rd. (1906), 11 I. C. C. Rep. 537.
5. Mansfield Hardwood Lumber Co. v. Tremont & G. Rd. Co. (1913), 26 I. C. C. Rep. 138, 139.
6. Paine Lumber Co. v. Cleveland, C. C. & St. L. Ry. Co. (1912), 24 I. C. C. Rep. 626, 628; Snyder-Malone-Donahue Co. v. Chicago, B. & Q. Rd. Co. (1910), 18 I. C. C. Rep. 498; Menefee Lumber Co. v. Texas & P. Ry. Co. (1909), 15 I. C. C. Rep. 49, 50; Colorado Bedding Co. v. Chicago, B. & Q. Rd. Co. (1910), 18 I. C. C. Rep. 403, 404; Burnham-Munger-Root Dry Goods Co. v. Director General, as Agent, Baltimore Steam Packet Co. (1920), 58 I. C. C. Rep. 73; Acme Cement Plaster Co. v. Director General, as Agent, Pere Marquette Ry. Co. (1920), 59 I. C. C. Rep. 411, 412.
7. In the Matter of the Investigation and Suspension of Advances in Rates by Carriers for the Transportation of Coal and Coke in Carloads from Points on the Louisville & Nashville Railroad to Points on the Cleveland, Cincinnati, Chicago & St. Louis Railway and Other Destinations (1913), 26 I. C. C. Rep. 20, 26.
8. Board of Railroad Commissioners of the State of Montana v. Butte, A. & P. Ry. Co. (1914), 31 I. C. C. Rep. 641, 648.
9. Georgia-Carolina Brick Co. v. Southern Ry. Co. (1911), 20 I. C. C. Rep. 148, 149.
10. De Camp Bros. v. Southern Ry. Co. (1909), 16 I. C. C. Rep. 144.
11. Iola Portland Cement Co. v. Missouri, K. & T. Ry. Co. (1911), 20 I. C. C. Rep. 91.

#### 610-E. COMPARISON OF RATES ON DIFFERENT LINES IN DIFFERENT SECTIONS OF THE COUNTRY.

While the revenue per ton per mile over other routes on other lines and to other destinations is often suggestive in arriving at a proper estimate of the reasonableness of a rate over a route complained of, it is by no means conclusive.<sup>1</sup> It is a matter of common knowledge that freight rates are controlled by various and varying conditions, and therefore the rates established in one section of the country furnish no reliable standard by which to measure the reasonableness of rates in another section where dissimilar conditions prevail.<sup>2</sup> Such rates therefore can have no evidentiary bearing unless substantial similarity in transportation conditions is shown.<sup>3</sup> Varying conditions existing on different lines must, of necessity, justify differences in rates for hauls of the same distance. The real question in any such complaint is the reasonableness of the particular rate on the particular line between the particular points in question.<sup>4</sup> In testing such a rate the rates on the same or adjacent lines in the immediate territory where the same conditions exist are of much greater significance and afford a much more accurate basis for action by the Commission.<sup>5</sup>

There is no reason why rates should greatly exceed similar rates upon other roads in other portions of the country where density of traffic and conditions of operation are analogous.<sup>6</sup>

The relatively high density of the particular traffic in the territory from which the comparisons are drawn would fairly indicate the propriety of rates on that traffic in that territory which are relatively low as compared with rates applicable to other commodities transported in the same territory. Likewise, a relatively low density of the particular traffic in the territory involved would indicate the propriety of relatively high rates on that traffic.<sup>7</sup>

1. Dallas Freight Bureau v. Gulf, C. & S. F. Ry. Co. (1907), 12 I. C. C. Rep. 223.
2. Acme Cement Plaster Co. v. Lake Shore & M. S. Ry. Co. (1909), 17 I. C. C. Rep. 30; Interstate Commerce Commission v. Louisville & N. Rd. Co. (1896), 73 Fed. Rep. 409; Cattle Raisers' Assn. v. Missouri, K. & T. Ry. Co. (1905), 11 I. C. C. Rep. 296; New Orleans Cotton Exchange v. Illinois C. Rd. Co. (1890), 3 I. C. C. Rep. 534; 2 I. C. Rep. 777; Business Men's Assn. v. Chicago, St. P. M. & O. Ry. Co. (1888), 2 I. C. C. Rep. 52, 2 I. C. Rep. 41; Dallas Freight Bureau v. Missouri, K. & T. Ry. Co. (1907), 12 I. C. C. Rep. 427; Lincoln Creamery Co. v. Union P. Ry. Co. (1892), 5 I. C. C. Rep. 156, 3 I. C. Rep. 794; Omaha-Oklahoma Fresh-Meat Rates (1913), 28 I. C. C. Rep. 454, 457; Worn v. Boca & L. Rd. Co. (1914), 32 I. C. C. Rep. 58, 59; Crutchfield & Woodfolk v. Louisville & N. Rd. Co. (1908), 14 I. C. C. Rep. 558, 559; Rhinelander Paper Co. v. Northern P. Ry. Co. (1908), 13 I. C. C. Rep. 633, 634.
3. Evans v. Northern P. Ry. Co. (1896), 6 I. C. C. Rep. 520.
4. Dallas Freight Bureau v. Gulf, C. & S. F. Ry. Co., *supra*.
5. *Ibid.*
6. Commercial Club of Salt Lake City, Utah, v. Atchison, T. & S. F. Ry. Co. (1910), 19 I. C. C. Rep. 218, 223.
7. Eastern Live-Stock Case (1915), 36 I. C. C. Rep. 675, 682.

#### 610-F. THE DIVISIONS OF A JOINT THROUGH RATE ARE NO CRITERIA BY WHICH TO MEASURE LOCAL RATES.

A part of a through rate may legally be less than the local rate between the same or less distant points.<sup>1</sup>

Where two connecting carriers unite by putting into force a joint through tariff between two points such joint tariff is not the standard by which the reasonableness of the local tariff is to be determined.<sup>2</sup>

The division of a joint through rate between carriers in a line of transportation furnishes no fair or just criterion by which to measure the intermediate local rates on the same line of transportation.<sup>3</sup>

It is not unlawful under Section 4 of the Interstate Commerce Act for a carrier to accept as its share of a joint through rate a less sum than its local rate for a shorter haul.<sup>4</sup>

A carrier by electing to accept a low division of a joint through rate for a long haul rather than to stay out of the business cannot be held to have thereby committed itself to that division as a measure of the reasonableness of other rates for transportation between the same points, on business from and to different distances or of a different character.<sup>5</sup>

The United States Supreme Court has held that the fact that a disparity between through and local rates is considerable will not, of itself, be regarded as conclusive evidence of undue discrimination.<sup>6</sup>

It is consistent with the law for a carrier, within reasonable limits, to accept less per ton per mile upon long hauls than upon short hauls and to widen the disparity between such rates as the difference between distances increases. Hence the proportion received by certain carriers out of a long distance through rate is not necessarily the measure of

the through rate which such carriers are entitled to make over a materially short distance, though such proportion is an important consideration in determining the rightful relation of the through rates.<sup>7</sup>

If the carrier participating in a joint through rate desires to reduce or increase the separately established local rates via the same routes, the order of the Interstate Commerce Commission requiring the maintenance of a joint through rate is no bar to their doing so.<sup>8</sup>

1. Parsons v. Chicago & N. W. Ry. Co. (1897), 167 U. S. 447, 17 Sup. Ct. Rep. 887, 42 L. Ed. 231; affirming, Parsons v. Chicago & N. W. Ry. Co. (1894), 63 Fed. Rep. 903, 11 C. C. A. 489; Tozer v. United States (1892), 52 Fed. Rep. 917.
2. Parsons v. Chicago & N. W. Ry. Co. (1894), 63 Fed. Rep. 903, 11 C. C. A. 489, 27 U. S. App. 394; affirming, Parsons v. Chicago & N. W. Ry. Co. (1897), 167 U. S. 447, 17 Sup. Ct. Rep. 887, 42 L. Ed. 231; Chicago & N. W. Ry. Co. v. Osborne (1892), 52 Fed. Rep. 912, 3 C. C. A. 347; Reversing, Osborne v. Chicago & N. W. Ry. Co. (1891), 48 Fed. Rep. 49.
3. McMorran v. Grand Trunk Ry. Co. (1889), 3 I. C. C. Rep. 252, 2 I. C. Rep. 604; Acme Cement Plaster Co. v. Lake Shore & M. S. Ry. Co. (1909), 17 I. C. C. Rep. 30; Board of Trade of Winston-Salem, N. C. v. Norfolk & W. Ry. Co. (1909), 16 I. C. C. Rep. 12; Omaha Cooperage Co. v. Nashville C. & St. L. Ry Co. (1907), 12 I. C. C. Rep. 250; New Orleans Cotton Exchange v. Illinois C. Rd. Co. (1890), 3 I. C. C. Rep. 534, 2 I. C. Rep. 777; Chicago & N. W. Ry. Co. v. Osborne (1892), 52 Fed. Rep. 912, 3 C. C. A. 347; reversing, Osborne v. Chicago & N. W. Ry. Co. (1891), 48 Fed. Rep. 49; United States v. Mellen (1892), 53 Fed. Rep. 229; James & Abbott v. Canadian P. Ry. Co. (1893), 5 I. C. C. Rep. 612, 4 I. C. Rep. 274; Mayor and Council Wichita, Kas. v. Atchison, T. & S. F. Ry. Co. (1903), 9 I. C. C. Rep. 558; Railroad Commissioners of Kentucky v. Cincinnati, N. O. & T. P. Ry. Co. (1897), 7 I. C. C. Rep. 380; Manahan v. Northern P. Ry. Co. (1909), 17 I. C. C. Rep. 95, 97; Thatcher v. Fitchburg Rd. Co. (1887), 1 I. C. C. Rep. 152, 1 I. C. Rep. 356; Lippman & Co. v. Illinois C. Rd. Co. (1889), 2 I. C. C. Rep. 584, 2 I. C. Rep. 414; Jennison Co. v. Great N. Ry. Co. (1910), 18 I. C. C. Rep. 113, 119.
4. United States v. Mellen, *supra*.
5. Burnham, Hanna, Munger Dry Goods Co. v. Chicago, R. I. & P. Ry. Co. (1908), 14 I. C. C. Rep. 299, 310.
6. Texas & P. Ry. Co. v. Interstate Commerce Commission (1896), 162 U. S. 197, 16 Sup. Ct. Rep. 666, 40 L. Ed. 940. See Parsons v. Chicago & N. W. Ry. Co., *supra*; Railroad Commission of Nevada v. Southern P. Co. (1910), 19 I. C. C. Rep. 239, 252; Jennison Co. v. Great N. Ry. Co. (1910), 18 I. C. C. Rep. 113, 121.
7. Colorado Fuel & Iron Co. v. Southern P. Co. (1895), 6 I. C. C. Rep. 488.
8. Michigan Buggy Co. v. Grand Rapids & I. Ry. Co. (1909), 15 I. C. C. Rep. 299.

#### 610-G. DIVISION OF JOINT THROUGH RATE NOT CONCLUSIVE EVIDENCE OF REASONABLENESS OF JOINT THROUGH RATE ITSELF.

Under the law as construed by the Commission, a joint through rate is a unit, an entirety, with the divisions or component parts of which the public is not concerned unless the joint rate as a whole is illegal.<sup>1</sup>

Although a shipper or consignee has no direct interest in the way a joint rate is divided between the carriers, nor in the amount of the division received by each carrier, he is entitled, nevertheless, to inquire into such division when he complains that the joint rate is unlawful, for the amount received by the different carriers may be significant upon the reasonableness of the aggregate charge.<sup>2</sup>

Only when the public or a shipper complains of the illegality of a joint through rate as a whole can one or more of the divisions of such rate be inquired into to determine if the illegality of the whole rate is traceable to the illegality of a specific part thereof.<sup>3</sup>

While a division of a through rate long accepted by a carrier may often be pertinent evidence, it is not a sound final test of the reason-

ableness of the through rate itself;<sup>4</sup> and when an unlawful rate results from some arbitrary share or division exacted by one of the carriers, the Commission will find the facts and state its conclusion with respect to such share or division.<sup>5</sup>

If the through rates are not unreasonable, the Commission can not condemn the same on account of the divisions thereof to the various roads forming the through lines, the law and public being alike served by rates in the aggregate reasonable and not affected by their distribution.<sup>6</sup>

In *Stevens Grocer Co. v. St. Louis, I. M. & S. Ry. Co.*<sup>7</sup> upon complaint alleging that through rates charged to Parkin and Wayne, Arkansas, on certain carloads of coal from points in Kentucky, Maryland, and Alabama, by way of Memphis, Tenn., and that the local rates from Memphis to the same points were unjust and unreasonable, the factors of the through rates beyond Memphis and the local rates from Memphis being attacked, and the complaint naming no defendant other than the delivering carrier operating from Memphis to destinations, *Held*: That where a through rate is alleged to be unreasonable all the carriers which participate or participated therein should be named as defendants; that a through rate is a transportation unit, although its factors or component parts may be separately established; and being a unit its parts, as such, may not be attacked unless the through rate itself is also attacked; that nevertheless certain rates, such as local rates, or joint rates, which may be used as parts of through rates may be attacked as applicable to local shipments.

In *Reno Grocery Co. v. Southern P. Co.*<sup>8</sup> complainant alleges that the division received by the defendant of the joint rate on sirup from St. Paul, Minn., to Reno, Nevada, was unjust and unreasonable. On January 28, 1911, one carload of sirup was shipped from St. Paul to complainant at Reno. Charges were assessed and paid on basis of rate of \$1.15 per 100 pounds, equivalent to the terminal rate of 75 cents per 100 pounds to Sacramento, Calif., plus the rate of 43 cents per 100 pounds for transportation from Sacramento to Reno. Complainant alleges that the defendant received out of this rate of \$1.18 its proportion of the terminal rate of 75 cents, together with the entire back-haul rate of 43 cents. Reparation is asked based on the back-haul charge. This shipment was received by the defendant carrier at Ogden, Utah, and transported from that point to Reno. Between St. Paul and Ogden the movement was over the lines of other carriers, who are not made parties in this proceeding, and whose identity is not disclosed. The rate of \$1.18 per 100 pounds was, at the time the shipment moved, a joint rate established by the participating carriers and published in a tariff in which all of these carriers joined, *Held*: That this through rate is attacked in the pleadings only by implication, and that if the purpose was to attack this rate, all of the participating carriers should have been joined as parties defendant; that what is actually attacked in the petition is a part of the division of the joint rate received by the defendant; that the division of a joint rate is a matter for agreement among the participating carriers and is not subject to review by the Commission upon complaint of a shipper; that, under the discretion of the Commission, be considered as evidence bearing upon the reasonableness of the rate; that under the circumstances

there is either a nonjoinder of the proper parties defendant or else the issue raised is without the jurisdiction of the Commission. Complaint dismissed.

Evidence of a through rate and the division thereof received by a carrier, held to be admissible for the purpose of showing what would be a fair and reasonable rate for such carrier to charge for a local haul.<sup>9</sup>

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1. Copper Queen Consolidated Mining Co. v. Baltimore & O. Rd. Co. (1910), 18 I. C. C. Rep. 154.
  2. Warren-Ehret Co. v. Central Rd. of New Jersey (1900), 8 I. C. C. Rep. 598; Boston Fruit & Produce Exchange v. New York & N. E. Rd. Co. (1891), 5 I. C. C. Rep. 1, 3 I. C. Rep. 604; Railroad Commission of Florida v. Savannah F. & W. Ry. Co. (1891), 5 I. C. C. Rep. 13, 3 I. C. Rep. 688; Florida Fruit & Vegetable Shippers' Assn. v. Atlantic C. L. Rd. Co. (1908), 14 I. C. C. Rep. 476, 487.
  3. Copper Queen Consolidated Mining Co. v. Baltimore & O. Rd. Co., *supra*.
  4. Bulte Milling Co. v. Chicago & A. Rd. Co. (1909), 15 I. C. C. Rep. 351.
  5. Warren-Ehret Co. v. Central Rd. of New Jersey, *supra*.
  6. Charlotte Shippers' Assn. v. Southern Ry. Co. (1905), 11 I. C. C. Rep. 108.
  7. Stevens Grocer Co. v. St. Louis, I. M. & S. Ry. Co. (1916), 42 I. C. C. Rep. 396.
  8. Reno Grocery Co. v. Southern P. Co. (1912), 23 I. C. C. Rep. 400.
  9. Halliday Milling Co. v. Louisiana & N. W. Rd. Co. (1906), 80 Ark. 536, 98 S. W. 374.

#### 610-H. RELATION BETWEEN WATER AND RAIL TRANSPORTATION.

When the Congress was given power to regulate commerce among the States, railroads had no existence. To whatever extent the regulation so provided for was intended to include transportation charges, it must have had special reference to the then existing transportation methods, which were mainly by lake, river or coastwise carriers.

The regulation for which provision is made in the Act to Regulate Commerce does not apply to commerce as it was conducted when the power to regulate was conferred upon Congress. The Act implies to water transportation only when "used under a common control, management or arrangement for a continuous carriage or shipment in connection with a railroad," and as part of a line or route of which another part is a railroad, and leaves carriers engaged in transportation wholly by water independent of regulation.

The exemption of so considerable a part of transportation from the operations of the law has an important bearing upon the railroad rates of the country.

The construction and maintenance of the way or track is a principal item in the cost of railway transportation, while the permanent way over navigable waters is free from all expense, and is maintained at public cost. In water transportation, carriers provide only the vessel or vehicle of carriage. There is, therefore, a wide difference in the cost of rail and water service, and water transportation charges can be very much the lower and still be remunerative.

Carriers by water are not required to publish rates, and are under no restrictions as to rebates, discriminations or preferences as to charges proportional as to distance. No stability is required in their charges, which may fluctuate as often as the exigencies of business rivalries dictate or the necessities for traffic render expedient. When-

ever rail and water transportation are in direct competition, a reduction of rail rates to meet the water charges is essential to secure any part of the traffic.<sup>1</sup>

See "Water carriers," Section 320, *ante*, "Independent water carriers—Inland—Ocean," Section 406, *ante*, and "Water Carriers—Panama Canal Act," Chapter 50, *post*.

1. Third Annual Report of Interstate Commerce Commission (1889).

#### 610-I. COMPARISON BETWEEN PRESENT RATE AND LOWER RATE MAINTAINED IN THE PAST.

The maintenance of a lower rate in the somewhat remote past does not necessarily prove anything of value in ascertaining the reasonableness of an existing rate.<sup>1</sup>

To what extent long previous existence of lower rates in *actual use* may justify an inference or presumption that they are sufficiently high, the mere publication of such rates in the general schedule, when they *have not been used*, is not conclusive proof that they are reasonably remunerative to the carriers.<sup>2</sup>

1. Enterprise Mfg. Co. v. Georgia Rd. Co. (1907), 12 I. C. C. Rep. 230.
2. Shiel & Co. v. Illinois C. Rd. Co. (1907), 12 I. C. C. Rep. 211.

#### 610-J. COMPARISON OF RATES TO COMPETITIVE AND NON-COMPETITIVE POINTS.

Rates to competitive points are not fair standards of the reasonableness of the rates to non-competitive points.<sup>1</sup>

1. Corporation Commission of the State of North Carolina v. Norfolk & W. Ry. Co. (1910), 19 I. C. C. Rep. 303, 308.

#### 610-K. COMPARISON OF LOCAL AND PROPORTIONAL RATES.

A proportional rate cannot be accepted as the standard of comparison with local rates.<sup>1</sup> However, while local and proportional rates are not ordinarily comparable, comparisons of such rates may be considered in connection with other evidence determining the reasonableness of a particular rate.<sup>2</sup>

1. Baltimore Chamber of Commerce v. Baltimore & O. Rd. Co. (1912), 22 I. C. C. Rep. 596, 602; In the Matter of the Advance of Rates on Live Stock from Kansas City, Mo., to St. Louis, Mo., and Other Mississippi River Crossings (1911), 21 I. C. C. Rep. 119, 122.
2. Lindsay Bros. v. Lake Shore & M. S. Ry. Co. (1912), 22 I. C. C. Rep. 516, 517.

#### 610-L. COMPARISON OF RATES IN OPPOSITE DIRECTIONS.

It has often been recognized by the Commission that the mere fact that a rate is higher one way between the same points than it is in the other, does not prove that the higher rate is unreasonable. This is particularly true where there is a preponderance of empty cars moving in one direction.<sup>1</sup>

A rate in one direction in excess of the rate between the same points in opposite directions which has not demonstrated the unreasonableness of the higher rate, especially where it is a class rate, and the movement of the particular traffic is not of sufficient volume to warrant the establishment of a commodity rate.<sup>2</sup>

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1. Louisville & N. Rd. Co. v. Interstate Commerce Commission (1912), 195 Fed. Rep. 541, 559; citing, Duncan v. Atchison, T. & S. F. Ry. Co. (1893), 6 I. C. C. Rep. 85, 103; MacLoon v. Boston & M. Rd. Co. (1903), 9 I. C. C. Rep. 642; Weil v. Pennsylvania Rd. Co. (1906), 11 I. C. C. Rep. 627.
  2. Parlin & Orendorff Co. v. Southern P. Co. (1916), 42 I. C. C. Rep. 29, 30, citing, Hull Vehicle Co. v. Southern Ry. Co. (1913), 28 I. C. C. Rep. 619; Meridian Cellulose Co. v. Director General, Canadian P. Ry. Co. (1920), 57 I. C. C. Rep. 283, 285; Samuel v. Director General, as Agent, Philadelphia & R. Ry. Co. (1920), 59 I. C. C. Rep. 190, 191; Phelps Dodge Corp., v. Director General, as Agent, Arizona E. Rd. Co. (1920), 59 I. C. C. Rep. 561, 562.

#### 610-M. COMPARISON BETWEEN CLASS AND COMMODITY RATES.

Commodity rates are ordinarily lower than class rates. The class rates therefore afford a reasonable test for measuring the general level of the commodity rates.<sup>1</sup>

Commodity rates are usually, if not invariably, lower than the class rates, being special rates presumably established on account of peculiar circumstances and conditions.<sup>2</sup> The general policy of the carriers is to make commodity rates somewhat lower than class rates on commodities, the movement of which is regarded as necessary to the development of mercantile interests and industries.<sup>3</sup> Commodity rates are in essence exceptions to the classifications based upon the belief of the economic expediency of such course.<sup>4</sup> Nevertheless, commodity rates are special rates which ought to be made with reference to all the conditions surrounding the transportation of the particular article between the particular points.<sup>5</sup>

See "*Class rates,*" Section 600-G, *ante*, and "*Commodity Rates*" Section 600-H, *ante*.

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1. Rate Increases in Official Classification Territory (1914), 31 I. C. C. Rep. 351, 401.
  2. Indianapolis Freight Bureau v. Cleveland C. C. & St. L. Ry. Co. (1909), 15 I. C. C. Rep. 367; Goerres Cooperage Co. v. Chicago, M. & St. P. Ry. Co. (1911), 21 I. C. C. Rep. 5, 6.
  3. Railroad Commission of Nevada v. Southern P. Co. (1910), 19 I. C. C. Rep. 238, 255.
  4. Railroad Commission of Nevada v. Southern P. Co. (1911), 21 I. C. C. Rep. 329, 332.
  5. State of Iowa v. Atchison, T. & S. F. Ry. Co. (1913), 28 I. C. C. Rep. 47, 63.

#### 610-N. RELATIONSHIP OF RATES ON RAW MATERIALS TO COMPETING INDUSTRIES.

Where an industry has been required to pay for a long period of time rates of freight on raw material which bear certain relations to rates charged to competitors at other points, a marked change in such relations of rates in favor of competing industries cannot be made without an attendant presumption of undue discrimination.<sup>1</sup> In comparing the rates on iron ore from Lake Erie ports to the competing manufacturing districts of Pittsburgh and Wheeling, the Commission stated that a weighted average distance in which each distance is given weight in accordance with the actual tonnage moving over it, seems

an equitable basis for comparison even though such an average varies with changes in the relative consumption at various points.<sup>2</sup>

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1. Detroit Chemical Works v. Northern C. Ry. Co. (1908), 13 I. C. C. Rep. 357, 362.
  2. Pittsburgh Steel Co. v. Lake Shore & M. S. Ry. Co. (1913), 27 I. C. C. Rep. 173, 174.

#### 610-O. COMPARISON BETWEEN CARLOAD AND LESS-THAN-CARLOAD RATES.

The terminal costs on a carload are much less than on a less-than-carload shipment, and for this and other reasons the cost of transporting a carload shipment is less per unit than the cost of transporting a less-than-carload shipment. The movement in carloads also results in economy of transportation facilities and is therefore greatly to be desired in the interests of the public as well as of the carriers. In any-quantity rates the spread is reduced to nothing.<sup>1</sup>

In *Western Classification Case*<sup>2</sup> the Commission said: "Assuming a proper relation between carload and less-than-carload rates, the establishment of carload rating whenever carload quantities are offered will, we believe, meet the needs of new and growing lines of industry without discrimination."

In *Southeastern Sugar Cases*<sup>3</sup> the Commission said: "A narrow spread between the carload and less-than-carload rates, however desirable from the standard of the New Orleans jobbers, tends to the waste of transportation facilities without adequate compensating advantages to the general public and is not to be encouraged."

See "*Lower rate for carload than for less-than-carload quantities,*" Section 609-00, ante.

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1. Brunswick-Balke-Collender Co. v. Chicago G. W. Rd. Co. (1920), 56 I. C. C. Rep. 340.
  2. In the Matter of Suspension of Western Classification (1912), 25 I. C. C. Rep. 442, 465.
  3. Southeastern Sugar Cases (1918), 48 I. C. C. Rep. 739, 747.

#### 610-P. COMPARISONS SHOULD BE MADE OF VOLUNTARY RATES.

In *Southwestern Shippers' Traffic Assn. v. Atchison, T. & S. F. Ry. Co.*<sup>1</sup> the Commission stated: "This argument overlooks the fact that the rate via these south Atlantic ports is strictly competitive. It is the rate from New York to Chicago, whether it be by rail, by rail-and-water, or by all-water which fixes the charge from New York through the south Atlantic port to the Mississippi River. That rate must be less than the all-rail rate or business will not move via that route. Hence, the rate cannot be said to be voluntary and ought not to be used as a standard of comparison."

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1. Southwestern Shippers' Traffic Assn. v. Atchison, T. & S. F. Ry. Co. (1912), 24 I. C. C. Rep. 570, 587.

#### 610-Q. COMPARISON OF RATES UNSUPPORTED BY EVIDENCE OF VARIOUS CIRCUMSTANCES AND CONDITIONS.

In the case of *Wickwire Steel Co. v. New York C. & H. R. Rd. Co.*<sup>1</sup> the Commission stated: "The proposition to which counsel's argument

tends, that no comparison of rates is ever justified except upon the actual submission of evidence of similarity of the various circumstances and conditions of transportation, would seem to be a somewhat extreme one. It is well known that rates have been frequently justified or condemned by this Commission upon records maintaining little else than mere rate and distance comparisons; under the condition, however, of a known general similarity of conditions, as for example where the movements compared are of the same commodity in the same territory. Granting, however, that there is some dissimilarity of conditions in the various movements involved in this and in the other related coke cases and that the differences now remarked by counsel are of a kind to influence the amount of the rates in question, we may say that, without attempting to assign the precise weight which should be given to these differences, we feel, confident that they do not sustain a valid criticism of the Buffalo rate, which we have approved. The rate of \$1.85 to Buffalo is not only not unreasonably high, but on the contrary is low when compared with the present rates to eastern Pennsylvania furnaces. It is also low as compared with the other rates determined to be reasonable by this Commission in the related coke-rate cases. A recent examination of the comparison has served only to strengthen this conclusion. Measurement of these rates by an arbitrary measuring rate computed from the rates themselves shows that the Buffalo rate, even using the distance of 314 miles urged by complainants, is still somewhat out of line with the other rates and might, if established solely upon the distance basis, which we do not suggest, be put as high as \$1.94 rather than \$1.85.

"This leaves for consideration complainants' contention that in justifying the increased rate the Commission must have gone, and in fact, did go, outside of the record in the instant case to support its conclusion, and that in so doing it deprived complainants of the hearing guaranteed them by the act. In support of their asserted rights in this regard counsel cite *Interstate Commerce Commission v. L. & N. R. R. Co.*, 227 U. S. 88, which holds that the statute gives parties a right to a full hearing and imposed upon the Commission the duty of deciding in accordance with the facts proved and holds, moreover, that information gathered by the Commission in the exercise of its jurisdiction conferred by section 12 of the act is not available where the party is entitled to a hearing. A brief answer to complainants' contention is that they were accorded a full hearing, that the Commission has decided in accordance with the facts proved and that it did not base its conclusion in the instant case on evidence introduced in the other coke-rate case. As has already appeared in the foregoing portion of this report, what the Commission did was simply to refer to its conclusions in those other cases, or, in other words, it used the rates there found to be reasonable after extensive examination and most careful consideration as a measure of the reasonableness of the rates in the *Wickwire case*. This is quite in accord with our ordinary practice as shown for example in *Rates for the Transportation of Cooperage from Salt Lake City*, 24 I. C. C. 656, 659. To contend that the commission could make no such comparison and that in deciding the *Wickwire case* or any particular case of the group it was compelled to shut its eyes to all the other cases or to divide its mind into separate compartments and to consider each one without any reference whatsoever to the other,

and this in the face of their unavoidably necessary relation, is a proposition which cannot be seriously advanced.

"A dictum in *United States v. B. & O. S. W. Ry. Co.*, 226 U. S., 14, 20, refers to this right of the Commission, to take notice of the results reached by it in other cases. The dictum, however, stipulates as a condition of this right that the facts thus noticed should be specified in the record, so that matters of law may be saved. This dictum is cited by complainants in their opening brief with the observation that in the present case nothing has been made to appear in the record as to the results reached in other cases and that a court would not be enabled to review the decision of the Commission in this regard. It is true that the Commission's decision does not specify with particularity the rates in the other coke-rate cases used as the standards of comparison. The Commission probably was betrayed into a lack of formality in this regard because of its consciousness of the familiarity both of the defendants and the complainants with the other cases which it had in mind. It assumed that both would quite clearly understand the reference to the other cases and would have easy access to the cited comparison. If the reference was, however, as a matter of record, too indefinite, it has now been corrected by the enumeration of the other cases in the preceding portion of this report and further cause of complaint in this regard would seem to disappear."

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1. *Wickwire Steel Co. v. New York C. & H. R. Rd. Co.* (1914), 30 I. C. C. Rep. 415, 423, et seq.

#### 610-R. RATE-PER-TON-PER-MILE COMPARISONS.

##### *Comparison of rate-per-ton-per-mile yield on different commodities.*

Comparisons of rates, revenue per ton-mile, per car-mile, per train-mile, etc., are frequently illuminating and helpful. The fact that the rates upon a certain commodity yield revenue per ton-mile higher than the average upon all traffic cannot be accepted as conclusive of the unreasonableness of such rates. If it were so accepted, the result would be a continual reduction of rates that yield higher than the average revenue, until all rates were on a common level. Consideration must be given to the value of the service. *If some commodities and the industries that use them can well stand rates that yield liberal profit to the carrier it can afford to transport at low rates other commodities that could not move except under low rates, and so the commerce and welfare of the country is promoted, as it must be, by the widest possible general diffusion and exchange of the products of the mine, the forest, the farm, the mill, the furnace, and the factory.*<sup>1</sup>

##### *Rates per-ton-per-mile based on the short haul.*

On the general principle that the shorter haul governs the rate, as a basis for comparison with other rates, the per-ton-per-mile revenue based on such shorter route should be used.<sup>2</sup>

##### *Comparison of ton-mile earnings must be under similar circumstances and conditions.*

In *Board of Improvement, Ft. Smith, Ark. v. St. Louis & S. F. Rd. Co.*<sup>3</sup> the Commission stated:

"In considering the traffic here in question Kansas City and Fort Smith cannot be said to be in the same section, and in the absence of a showing of substantial similarity of conditions, comparative and physical, surrounding the transportation thereto a comparison of rates to points so far distant is not conclusive either of unreasonableness or discrimination. To consider the yield per ton per mile as wholly controlling in a particular case is equivalent to the fixing of rates on the basis of distance alone. In the case of *Union Tanning Co. v. S. Ry. Co.*, 26 I. C. C. 159, 164, the Commission said:

"While in fixing reasonable rates and relative rate adjustments, distance must always be considered as bearing both upon cost to the carrier in performing the service to the value of the service to the shipper, there are many facts, such as density or sparsity of traffic over and along the lines of movement, comparative cost of construction and operation, and competitive conditions, which must be given weight. In some situations the other facts and conditions are so nearly uniform or similar that distance becomes the dominant factor in the relative adjustment of rates, while in others distance becomes, within limitations, a minor factor because of the dominating and controlling force of other facts and conditions; hence many striking inconsistencies would be apparent in different rate adjustments made by orders of this and state commissions, as well as voluntarily by the carriers, if examined and compared with regard to distance alone. If the Commission should dispose of these rate questions and controversies by resort alone or mainly to comparative distances, ton-mile earnings, and estimated relative earnings above the estimated so-called "out-of-pocket" cost to the carrier for each service performed, there could always be found standards for the reduction of every rate to the basis of the lowest, whatever may have compelled or induced its establishment. For the Commission to adopt such a course would inevitably lead to a continuous process of reducing the carriers' revenue, a result which would be detrimental to the public interest as well as unjust to carriers."

"There is no evidence that the rate to Fort Smith is out of line with rates to points in the same general territory, and it is claimed by defendants that any reduction therein would necessitate reductions in rates to other points.

"The facts presented do not convince us that the rate here in issue is unreasonable or unjustly discriminatory. The complaint will therefore be dismissed and it will be so ordered."

*Car-mile or train-mile basis versus per-ton-mile basis.*

Much of the profitable freight carried by the railroads of the United States, and perhaps this might be made broader, and it can be truthfully said that most of the freight which pays the carriers the best is that which yields the lowest rate per ton-mile. This arises out of many facts which the Traffic Manager takes into consideration—the volume of the traffic, the heavy load per car, and the regularity of the movement.<sup>4</sup>

While a fair basis for determining the reasonableness of rates is found in earnings per car-mile and per train-mile, the rate per ton per mile is instructive.<sup>5</sup> However, neither the ton-mile nor the car earnings furnish an absolutely correct test of the reasonableness of rates, but a better basis is to be found in the combination of the two.<sup>6</sup>

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1. Coke Producers Assn. of the Connellsville Region v. Baltimore & O. Rd. Co. (1913), 27 I. C. C. Rep. 125, 132.
  2. Pittsburgh Steel Co. v. Lake Shore & M. S. Ry. Co. (1913), 27 I. C. C. Rep. 173, 175.
  3. Board of Improvement, Fort Smith, Ark. v. St. Louis & S. F. Rd. Co. (1913), 26 I. C. C. Rep. 541, 542.
  4. In the Matter of the Investigation and Suspension of Advances in Rates of the Transportation of Coal by the Chesapeake & O. Ry. Co., Baltimore & O. Rd. Co., Norfolk & W. Ry. Co., The Kanawha & M. Ry. Co., and their Connections (1912), 22 I. C. C. Rep. 604, 620.
  5. Wisconsin Steel Co. v. Pittsburgh & L. E. Rd. Co. (1913), 27 I. C. C. Rep. 152, 162.
  6. Bahrenburg Bros. & Co. v. Atlantic C. L. Rd. Co. (1912), 24 I. C. C. Rep. 560, 566.

**610-S. TERMINAL SERVICES IN THE DELIVERY AND RECEIPT OF TRAFFIC AS ELEMENTS TO BE CONSIDERED IN THE RELATIONSHIP OF RATES.**

In *St. Louis Chamber of Commerce v. Baltimore & O. Rd. Co.*<sup>1</sup> the Interstate Commerce Commission, per Mr. Commissioner Aitchison, said: "The clause of section 1 of the act which defines transportation as including terminal delivery is jurisdictional, and does not affect the measure of the rate, or relationship of rates, for the terminal service included within the transportation. This interpretation is reflected in our own action in cases previously cited wherein we prescribed higher rates for farther distant points in the Chicago switching district than to nearer points on the same line in that district. The determination of the issue in such cases turns upon the relative services rendered under the respective through-rate units as a whole, including line-haul and terminal delivery, as necessarily separating the one from the other."

See "*Service in the delivery and receipt of traffic at terminals,*" Section 608-S, ante, and "*Terminal Facilities and Regulations,*" Chapter 16, post.

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1. St. Louis Chamber of Commerce v. Baltimore & O. Rd. Co. (1920), 57 I. C. C. Rep. 639, 653; citing, *Associated Jobbers of Los Angeles v. Atchison, T. & S. F. Ry. Co.* (1910), 18 I. C. C. Rep. 310; *Gilmore & Co. v. Chicago & N. W. Ry. Co.* (1912), 25 I. C. C. Rep. 403; *Hammerschmidt & Franzen Co. v. Chicago & N. W. Ry. Co.* (1914), 30 I. C. C. Rep. 71; *Illinois Coal Cases* (1915), 32 I. C. C. Rep. 659; *Business Men's League of St. Louis v. Atchison, T. & S. F. Ry. Co.* (1917), 44 I. C. C. Rep. 308; *Dimmitt-Candle-Smith Live Stock Commission Co. v. Chicago, B. & Q. Rd. Co.* (1917), 47 I. C. C. Rep. 287; *Committee on Ways and Means to Prosecute the Case of Alleged Railroad Rate and Service Discrimination at the Port of New York v. Baltimore & O. Rd. Co.* (1917), 47 I. C. C. Rep. 643; *Chicago, M. & St. P. Ry. Co. v. Minnesota Civic Assn.* (1918), 247 U. S. 490, 62 L. Ed. 1229, 38 Sup. Ct. Rep. 553.

**610-T. RELATIONSHIP BETWEEN COMMODITIES.**

A very important factor is the relation existing between the articles transported. If the relation is remote, such as that between flour and silk, a charge of a few cents per 100 pounds in rates charged for transporting one of them may not affect traffic in the other; but if the relation is close, such as between raw material on the one hand and goods manufactured from that material on the other, the slight change in the adjustment of transportation charges between the two articles may be sufficient to close manufacturing plants at some points, and increase the output of plants located elsewhere, and it is because of this difference that some discriminations made by carriers are justifiable under certain conditions.<sup>1</sup> This advantage to the shipper of one product cannot be predicated upon the charges for transporting another product differing essentially in character from the former and widely dissimilar in the demands which it supplies.<sup>2</sup>

However, where articles are competitive in the same market, a fair and just relation should obtain in fixing the rates for the transportation of such articles. The rates on wheat, for instance, should not exceed the rate on flour, the manufactured product.<sup>3</sup> There is no inflexible requirement that rates upon grain and the products of grain should be, under all circumstances, the same, but rather that carriers may, in just regard for their own interests, or to meet special conditions, vary these rates within narrow limits. When once the relation has

been established, business developed, and money expended upon the strength of it, then the carrier cannot, in the absence of some sufficient reason, change that relation; nor would the Commission direct a change.<sup>4</sup>

In *Bulte Milling Co. v. Chicago & A. Rd. Co.*<sup>5</sup> the Commission stated: "The suggestion also concedes the propriety of a parity of rates on wheat and flour so far as the millers of this country are concerned, for the proposition is that export flour and wheat intended to be ground into flour and exported in that form should move on equal terms. In other words, counsel proposes to solve the troubles of the American millers by requiring the carriers to raise their rates on wheat moved to the seaboard for export as wheat. It may be that much may be said in favor of the suggestion, but it is one as to which the American wheat growers would doubtless wish to be heard before any order is entered. It is a well-established principle of transportation, as heretofore stated, that the rates on manufactured products ought generally to be higher than the rate on the raw materials from which they are made. The fostering of our flour industry in its competition with foreign millers, by requiring the carriers to the seaboard to maintain a lower rate on flour than on wheat, would not only be in derogation of that principle of rate regulation, but would be a matter of national policy which, as we understand our duties under the law, this Commission would have no authority to adopt as the basis of its action until it had been accepted, in principle at least, by the Congress and has been made a rule of transportation by adequate legislation."

In *State of Iowa v. Atlantic C. L. Rd. Co.*<sup>6</sup> the Commission, per Mr. Commissioner Harlan, said: "It is true that in some cases we have given to the product the rate fixed by the carriers on the raw material from which it is made; and in some cases we have fixed a relation by approximating the rate on the product to the rate on the raw material. But in all such cases the rate actually fixed by the Commission on the particular commodity was the rate deemed by the Commission, under all the circumstances surrounding the traffic, to be the reasonable rate. And that is the extent of our authority under the law when dealing with a rate on the basis of its reasonableness. There is no rule that the manufactured product is entitled as a matter of right to the rate on the raw material from which it is made; and confusion would necessarily result from the rigid application of any such principle."

Classification must be based upon a real distinction from a *transportation* standpoint. The Commission has held that there is no transportation reason why different rates should be applied on fire brick, building brick and paving brick. Aside from the difficulty in learning to what use the bricks were to be put to upon reaching their destination, the Commission stated that it cannot regard a classification as scientific, or a difference of rates as well based, which is altogether founded upon a distinction that has no transportation significance. Such a differentiation, if permitted and extended throughout the various classes of freight, would lead to an almost endless multiplication of rates, which could find no excuse save the use which might be made of the articles transported.<sup>7</sup>

Fixing rates by comparison with an article not similar in character, use, value or mode of shipment is not proper. Rates should not be fixed for a commodity by the condition of an arbitrary over the rates of other commodities having no relation to the former and being wholly different in character.<sup>8</sup>

The following treats of the more important cases where the relationship between commodities has been considered by the Commission:

*ACID, SULPHURIC:* Sulphuric acid is strictly a raw material used in the manufacture of fertilizer and a distinctly lower rate should be applied to its transportation than upon the manufactured fertilizer.<sup>9</sup>

*BICYCLES:* The proper comparison for the purpose of testing the reasonableness of the rate on bicycles is with the rates on other vehicles.<sup>10</sup>

*BLINDS, DOORS AND SASHES:* Ordinarily the same rate as applies to all lumber without reference to its value or condition, and this rate frequently includes not only manufactured lumber but articles made from it, like doors, sashes, and blinds.<sup>11</sup>

*BRICK:* The Commission has held that there is no transportation reason why different rates should be applied on fire brick, building brick and paving brick.<sup>12</sup>

In the case of *National Paving Brick Manufacturers' Ass'n v. Alabama & V. Ry. Co.*<sup>12½</sup> the Commission in passing upon a proposed uniform brick list, made the following interesting finding with reference to the production and distribution, and transportation characteristics of various kinds of brick and tile:

"The production of brick and tile in 1916, estimated from the values of clay products as shown in a Government publication of record, was as follows:

	Tons.	Per cent of total.
Common Brick .....	18,485,000	57
Paving brick .....	3,700,000	12
Face brick .....	2,500,000	8
Tile .....	3,000,000	9
Fire brick .....	4,500,000	14
Total .....	<hr/> 32,185,000	<hr/> 100

"The percentages, in thousands, of common, paving, and face brick produced during that year were: Common brick, 79.2 per cent; paving brick, 10.1 per cent; and face brick, 10.7 per cent.

"Brick and tile plants are usually located at or near a deposit of clay or shale suitable for the manufactured product. Certain chemical qualities frequently determine the product that can be made to the best commercial advantage. Building tile is made from shale or clay, and brick and tile are sometimes made in the same plants of the same raw materials, a shift from brick to tile involving merely a change of the dies and cutting machines. Face brick is frequently made from the same kind of clay or shale as other brick, although certain types are made from a better grade of clay, and more care is exercised in the manufacture and handling of face brick than in the case of common brick. The culs or seconds of paving, face, and fire brick, which are not in excess of 20 per cent of the product of the kiln, are sold in com-

petition with common brick; and paving brick which can not stand the paving-brick tests are often used as face brick in the construction of large buildings.

"What is strictly known as common brick is a nonvitrified brick produced from local or low-grade surface clay found practically everywhere. It is the cheapest brick in any locality and, unlike other brick and tile, usually moves for short distances only. The large producing districts for paving brick are the Ohio-Pennsylvania, Illinois-Indiana, and Oklahoma-Kansas districts. The production of paving brick in the South is largely in Alabama, with some in Tennessee and Georgia. Of the total face-brick output of the country, about 73 per cent is produced in central and trunk-line territories, 5 per cent in the South, and the remainder west of the Mississippi River. Fire brick is produced at various localities where fire clay is available. It is made in three grades, high, intermediate, and low, the grade or heat-resisting quality depending on the quality of the fire clay used. About 73 per cent of the building tile is produced in central and trunk-line territories, 25 per cent in the West, and 2 per cent in the South. Paving, face, and fire brick have a wide distribution, and move long distances except where the movement is restricted by competition. Building tile is both short-haul and long-haul traffic.

"The standard paving brick is 2½ by 4 by 8 inches. Paving brick is also made in two larger common sizes, 3½ by 4 by 8½ inches, and 3 by 4 by 8½ inches. The general size of face and common brick is 8 by 2¼ by 3¾ inches. The average weights per 1,000 bricks are: Paving, 3.5 to 5 tons; common, 2 to 2.5 tons; face, 2.75 tons; and fire, 3.5 tons. An 8 by 12 by 12 hollow building tile weighs from 30 to 36 pounds, and displaces 14 bricks of standard size.

The range of values of the various kinds of brick and hollow building tile f. o. b. plant was, at the time of the hearing, as follows: Common brick, \$6.50 to \$10 per ton, or \$14 to \$24 per 1,000, depending largely on the locality in which produced; No. 11 paving brick, \$7 to \$7.50 per ton, or about \$35 per 1,000; face brick, from \$8 to \$13 per ton, or from \$20 to \$40 per 1,000, with a small proportion of higher value, the difference in value depending largely on the shade and texture; fire brick, \$11.40 to \$14.30 per ton, or \$40 to \$50 per 1,000; and hollow building tile, including segment block, silo block, and condensing rings, approximately \$10 per ton on the average. The value of conduits is \$17 per ton. The value of radial-chimney block is not shown, although apparently it falls within the range of values on other hollow building tile. Perhaps the lowest grade common brick is what is known as the Chicago common brick, produced at Chicago, Ill., and vicinity. This brick weighs about 4 pounds each and, as stated, sells for \$14 per 1,000, while face brick ranges in value from \$20 to \$40 and higher per 1,000. According to the Government publication above referred to, the average value per 1,000 of the common brick produced in the United States in 1916 was \$6.08; paving brick, \$13; and face brick, \$11.43. The average value of hollow building tile in 1917 was \$5.12 per ton.

"The brick and tile traffic moves in a wide range of equipment, frequently in cars which would not be suitable for most commodities,

and in cars, particularly stock cars, which would otherwise move empty for loading. No expedited service is required on this traffic, and with the exception of fire brick, it moves generally in the summer months when operating conditions are favorable. It is ordinarily shipped under weight agreements, thus eliminating the expense of weighing. From large producing points to common junctions it moves in train lots. Deliveries are ordinarily made on team tracks. Loss and damage claims on brick and hollow building tile are negligible.

"Brick and hollow building tile load heavily and constitute perhaps the heaviest loading commodities shipped in as wide a range of equipment. In recent years the average loading per car of these commodities except silo block has exceeded 60,000 pounds. The general practice of the face-brick industry is to load 110 per cent of the marked capacity of the car. About 22 tons of silo block are used in the construction of a silo, and the actual loading of that commodity is affected more or less by the commercial limitation, although it can readily be loaded in excess of 60,000 pounds. Face brick and certain so-called common brick sold for facing purposes are loaded with straw between each course. Common brick are thrown into the car or loaded without any protection against chipping or breaking. Straw is not ordinarily used in loading hollow building tile. The tile is loaded in tiers and wedged in tightly with broken pieces of tile.

"The present minimum on brick and hollow building tile is generally 50,000 pounds except in southern territory where the minimum varies from 24,000 to 40,000 pounds and is usually 40,000 pounds where commodity rates apply. Complainants offer to accept a minimum of 60,000 pounds, marked capacity of car to govern if less, if the increased minimum is recognized in fixing the level of the rates. Most of the interveners are also agreeable to a 60,000-pound minimum if hollow building tile is permitted to move under the brick classification in mixed carloads with brick. The Alabama interveners, upon brief and argument, oppose any increased minimum in excess of 50,000 pounds in southern territory.

"Complainants propose the following list of clay products for universal application in all territories:

Brick or block: building or facing except enameled;  
Brick, fire;  
Brick or block: common, solid, hollow or perforated;  
Brick or block: paving, shale or fire clay;  
Brick: salt glazed when shipped in same manner as building or facing brick;  
Ground clay, ground shale or ground fire clay;  
Blocks or tile: hollow building or condensing;  
Blocks: silo, radial chimney and segment;  
Conduits: clay or shale, not lined;  
Slabs: clay or shale, not enameled, not roofing or ornamental, loaded loose in cars, when shipped in the same manner as building or facing brick;  
Tile: hollow building or fireproofing.

"Complainants state that the purpose of this list is to include all clay products of substantially the same transportation characteristics, similar car loadings, risk, value, common raw materials, and equipment used, but that they do not seek to exclude any commodity which is fairly entitled to be in such list.

"In *Stowe-Fuller Company v. Pennsylvania Co.*, 12 I. C. C., 215, we found that the same rates should apply on fire, building or face,

and paving brick from certain producing points in Ohio to New York, N. Y., and other eastern destinations. In *Metropolitan Paving Brick Co. v. Ann Arbor R. R. Co.*, 17 I. C. C., 197, with which was consolidated a rehearing of the *Stowe-Fuller case, supra*, this question was again considered on a very complete record and the same conclusion reached. The record in this proceeding emphasizes the correctness of that conclusion. Following those decisions, the carriers in the eastern district have generally applied the same rates on a long list of other clay products, including hollow building tile and the other articles named in complainants' proposed classification. This list has been modified from time to time to meet the demands of various shippers for the inclusion of their products, and embraces flue lining and other articles which are more fragile and do not load as heavily as brick and hollow building tile, but which complainants do not ask to have included in a uniform list.

"Silo, radial-chimney, and segment block, conduit, and condensing rings or block, are forms of hollow building tile designed for particular purposes and should take the same rate as hollow building tile. Silo block, segment block, and radial-chimney block are slightly curved so as to form a complete circle when laid. Silo block has numerous apertures and a groove in the top to hold a reinforcing iron. Segment block is similar to silo block and is used in the construction of sewers over 36 inches in diameter. Radial-chimney block is used in the construction of chimneys and stacks. Condensing blocks usually weigh from 6 to 7 pounds each and are made in square or cylindrical form, reinforced with partitions or spirals. They are used in the oil and acid business for purifying purposes and were produced and shipped in large quantities during the World War. The cylindrical shape does not prevent loading to the capacity of the car. Conduits are used by telephone companies to protect their underground wires. Imperfect conduits are used as hollow building tile for foundations. The conduits are usually made of fire clay and are vitrified to render them impervious to moisture. They constitute only a small percentage of the hollow-tile production, and are made in various shapes and sizes, ranging from a single-duct conduit of octagonal shape, 18 inches long and with a circular opening of about 3½ inches in diameter, to nine-duct rectangular conduits 12 by 12 by 36 inches.

"While the record indicates that some forms of hollow building tile are more susceptible to damage than is brick, the additional risk does not appear to be sufficient to warrant a difference in rates, particularly when it is considered that the average value of hollow building tile falls well within the range of values of brick. In the case of standard hollow building tile the chipping or even the breakage of a section does not ordinarily prevent its use in walls. Samples exhibited at the hearing demonstrate that no clear line of demarcation can be drawn between brick with varying percentages of solidity and hollow building tile, and that it is difficult to say where brick ends and where tile begins. Hollow building tile is made from the same raw materials as brick, frequently at the same plant. It is used largely for the same purposes, and the various transportation elements are substantially the same.

"In the *Metropolitan Brick Companyy case, supra*, we found that common building brick, namely, that produced from ordinary clay

at kilns in practically every community, should be distinguished from the higher grades of brick and that it had no place in the classification with such higher grade brick. The Chicago common-brick producers, interveners, earnestly insist that that doctrine should be adhered to. Apparently defendants are not opposed to applying a relatively lower basis of rates on common brick than on other brick if the common brick can be differentiated so as to be effectively policed. The seconds and culls of the higher grade brick are frequently sold in competition with common brick and the apprehended difficulty in policing rests largely on the assumption that such brick should take the same rates as common brick. If common brick is accorded a lower basis of rates and these seconds and culls of the higher grade brick are given the same rates as common brick, the practical impossibility of distinguishing the seconds or culls from the first-grade brick, so as to insure that the latter will not be included, is apparent and is generally recognized both by complainants and the carriers. However, if the lower basis of rates is confined to what is more strictly termed common brick, namely, brick not vitrified, made from low-grade surface clay, loaded loose in the cars without straw or other protection against breakage, and shipped for distances not in excess of 150 miles, the carriers should experience no great difficulty in policing the movement. The characteristics of such common brick are usually well known in the territory in which they are produced and this is particularly true of the Chicago common brick. While it is true that the seconds and culls of the higher grade brick compete with common brick, they are not necessarily to be regarded as such strictly competitive articles of the same class as to entitle them to the same rate. The ordinary common brick is the finished product of the kiln, while the seconds and culls which are sold in competition with the common brick are the waste or by-products which are produced as an incident to the manufacture of the higher grade brick and must be disposed of. They can and should bear a greater share of the transportation burden than does ordinary common brick. Furthermore, there is a large and growing use of the seconds of paving brick in competition with face brick and the seconds or culls of paving brick are also used to a considerable extent for private paving purposes.

"While for obvious reasons we have repeatedly refused to sanction different rates on the same commodity based upon the use to which the article is put, it may be observed that the widespread use of a certain kind of brick for a given purpose is a circumstance of evidentiary value to be considered along with other facts in determining the proper description to be applied. What is known as Harvard brick, for example, manufactured in New England, while referred to by complainants as a common brick, is used exclusively for facing purposes. It is worth \$45 per 1,000 and is properly classified as face brick. In a proceeding of this general character it is impossible to determine specifically the proper description to be applied to the various individual makes of brick. If the shippers and carriers, following the general principles laid down herein, are unable to agree as to the proper description of any particular type of brick, that matter may be made the subject of a separate complaint. As stated, common brick is ordinarily short-haul traffic and for abnormal move-

ments, or those in excess of 150 miles, we are of opinion that the carriers may reasonably charge the same rates as on face brick.

"Hollow building tile is, and for many years has been, carried on the brick basis in New England, trunk-line, central, and western trunk-line territories, as well as from central and trunk-line territories to the Southwest. In the South, where there is a comparatively small production of hollow building tile, there is no fixed relationship between the rates on hollow building tile and brick, and there are but few commodity rates on hollow building tile. In some instances the rates are same, in others higher, and in others lower than on brick. Paving brick sometimes takes lower rates than common brick. In the Southwest there is one basis of rates on common, face, and paving brick, and a higher basis of rates on fire brick and hollow building tile, which latter basis of rates also applies on flue lining and drain tile. From the Kansas gas belt the rates on brick and tile to Texas points are same. From St. Louis, Mo., to Texas common points the rate on common brick is lower than on face and paving brick and hollow building tile.

"If face, fire, and paving brick and hollow building tile should, from a classification standpoint, take the same rates in one territory, there is obviously no good reason and none has been suggested why they should not also take the same rates in other territories. We are of opinion and find that it is, and for the future will be, unreasonable for defendants to fail to maintain a uniform brick list under which all of the articles named in complainants' proposal, except common brick, shall be accorded equal rates from and to the same points for interstate transportation, in carloads, within and between the territories involved in this proceeding, including the South and Southwest, said uniform brick list to be subject to a carload minimum weight not exceeding 60,000 pounds, marked capacity of car to govern if less than the minimum."

*BROOMS:* It is apparent that carriers are entitled to a somewhat higher rate for the transportation of brooms, than would be justifiable for the transportation of broom corn.<sup>13</sup>

*CANNED GOODS:* The two commodities, canned goods and canned milk, while by reason of analogy are generally given the same rates and ratings, are nevertheless distinct commodities, nor competing with each other. It does not follow from the fact that the rate on one of these commodities is reduced because of competitive conditions, that the carrier is compelled simultaneously to place the other commodity upon the same basis, or that a violation of the Act to Regulate Commerce necessarily results from the failure so to do.<sup>14</sup>

*CANTALOUPES:* Cantaloupes are fairly comparable with peaches. The two articles are about equally perishable, of substantially the same value, both move uniformly under refrigeration and require the same expedited service. The cantaloupe loads somewhat heavier than the peach, and for this reason may properly take a lower rate.<sup>15</sup>

*CASES, EGG:* The rate on egg-case material, when not manufactured further than cut to length, was found unreasonable to the extent that it exceeded the rate on box lumber.<sup>16</sup>

*CEMENT:* Comparison of cement and brick rates held not to be of substantial value.<sup>17</sup>

*CHINAWARE:* Chinaware shipped by complainant was of little greater value than crockery. Both commodities involve about the same risk and trouble in transit. They are competitive articles. The import rate which the defendant carriers apply to china and crockery from the port to the interior destinations is the same irrespective of the form of the package. *Held:* That the two articles ought to bear somewhat the same transportation charges.<sup>18</sup>

*CLEANER AND CLEANSER, WYANDOTTE:* "A simple commodity, advertised, sold and shipped under a trade name which does not disclose the real nature of the commodity is not improperly rated when rated the same as other and competing preparations of similar physical character and general nature."<sup>19</sup>

In *Ford Co. v. Michigan C. Rd. Co.*<sup>20</sup> the Commission stated: "In the argument defendant's counsel asserted that even if this commodity were in fact simple soda ash, and so marked and designated when tendered for shipment, the defendants could properly assess the fifth class rates upon such shipments if they were intended and used for cleaning and cleansing purposes. To this suggestion we cannot assent. We adhere to the view that the carrier may not assess its charges upon the basis of the use to which the commodity transported is put. Defendants may not say that they will transport soda ash at a certain rate but that if it is used for a certain purpose it shall bear a higher rate or enjoy a lower rate. Complainant may not demand or be accorded the soda-ash rate except upon shipments of soda ash designated as such when tendered for shipment, and so marked if marked at all. We see no objection to adding the trade name to the description of the commodity in marking packages tendered for shipment. For example: 'Soda ash (trade name Wyandotte Cleaner & Cleanser)' or 'Wyandotte soda ash,' and we see no reason for increasing the transportation charges because of such marking.

"It appears that the Wyandotte Cleaner & Cleanser is used principally where soap preparations are not desirable; for example, in cleaning milk cans; but it competes as far as it is able to compete with cleaning and cleansing powders and preparations in general, as is shown by its name and the statements made in advertising it. Complainant states that the Wyandotte Cleaner & Cleanser competes with soda ash and other alkaline preparations, which take soda-ash rates, and refers especially to Soda Crystals and to Snow Flake Crystals of Soda, which are stated to be soda in another form, and to be accorded soda-ash rates. It appears, however, that this commodity is provided for in tariffs in a group of articles taking certain rates, among which are 'Soda Ash,' 'Caustic Soda,' 'Crystal Soda,' etc., and that when tendered for shipment it is represented to be and is labeled 'Soda Crystals' or 'Snow Flake Crystals of Soda.'

"The duty rests upon the carrier to clearly and definitely state its rates and charges in its tariffs, and it is prohibited from accepting either more or less or different compensation for transportation than that so stated. The duty rests upon the shipper to clearly state and truly represent the character of his shipment, and he is entitled to no

rate except that shown in the carrier's schedule for the transportation of the commodity as tendered for shipment."

*COAL, ANTHRACITE:* The conditions relating to the transportation of anthracite and bituminous coal have not been shown to be similar to such a degree that the existence of a lower rate on bituminous would warrant a conclusion that a higher rate on anthracite on a different road is unreasonable.<sup>21</sup>

*COAL, SLACK:* Reference made to slack coal rates, which are on a level with rates on lump coal, are not helpful owing to difference in the use of the commodities.<sup>22</sup>

*COKE:* Coal and coke are seldom used for the same purposes in the industrial or manufacturing fields, and this, coupled with the wide difference in the cost, renders competition between them negligible.<sup>23</sup>

*COPIERS, LETTER:* The charge of one and one-half times the first class rate for the transportation of wrapped roller letter copiers in western classification territory found to be unreasonable, unjust and unduly discriminatory in favor of the ordinary letter press which takes second class rates and which is sold in competition with the first named article.<sup>24</sup>

*COPRA OIL:* Copra oil and cotton seed oil are competitive commodities with similar transportation characteristics.<sup>25</sup>

*COTTONSEED:* Cottonseed held to be entitled to the same rate to East St. Louis, Ill., from Arkansas and other points as cottonseed oil. Whether it is entitled to the same rate as cottonseed meal and cake not decided.<sup>26</sup>

*DAIRY PRODUCTS:* Perishable products afford no proper comparison with dairy products.<sup>27</sup>

*DOORS:* See "*Blinds, Doors and Sashes.*"

*DRESSED MEATS AND PACKING HOUSE PRODUCTS:* The United States Supreme Court has held that the cost of carriage, risk of injury, and the larger amount which the railway companies are called upon to pay out in damages for losses, may excuse a higher freight rate on live stock than on dressed meats and packing house products; that a reduction of freight rates for dressed meats and packing house products from Missouri River points and other points similarly situated to Chicago, which makes such rates lower than those charged for live stock, does not work an undue and unreasonable preference, where the higher rate on live stock has not materially affected any of the markets, prices, or shipments, being reasonably fair to Chicago and the shippers, and the shipments of live stock from the West to Chicago are as great in proportion to the bulk of the business as before the change of rates, and where the lower rate given to the packers was the result of competition, and does not strictly influence or injure shippers of live stock.<sup>28</sup>

*EGG ALBUMEN AND YOLK, DRIED:* Dried egg albumen and dried egg yolk are commodities separate and distinct from desiccated eggs, which consist of the dried whole egg.<sup>29</sup>

*EXCELSIOR:* Excelsior in carloads from St. Paul, Minn., to Chicago, Ill., and other points held entitled to the same rate as flax tow.<sup>30</sup>

**FOODS, BREAKFAST:** In the case of *Kellogg Toasted Corn Flake Co. v. Atchison, T. & S. F. Ry. Co.*<sup>31</sup> the Commission stated: "Toasted wheat biscuit and toasted wheat krumbles are cooked cereal products packed ready to serve. Cream of wheat, Post tavern porridge, and most other so-called uncooked cereal breakfast foods are subjected to a heating process before packing, but require further cooking before serving. The difference is not the difference between raw materials and manufactured products, but rather a difference in degree or stage of manufacture.

"Cooked and uncooked cereal breakfast foods compete commercially. They are normally sold at delivered prices, and in selling to jobbers, manufacturers of cooked products meet the prices of manufacturers of uncooked products. The price of one fluctuates with the price of the other. Complainant's toasted wheat biscuit and krumbles are apparently of substantially the same value as cream of wheat and Post tavern porridge and are packed substantially the same. The carrier's risk is also about the same for both classes of articles, and the transportation conditions are substantially similar. Both classes of articles are rated in the same in the official, southern, and western classifications, and different ratings are maintained only in the territory in controversy by special commodity tariffs and exceptions to the classifications. Both classes of articles move at the same rates from points in central freight association territory through the territory in controversy to Pacific coast terminals. Defendants are parties to tariffs which name the same rates on cooked and uncooked products in other territories.

"Upon all the facts recorded we find that the difference in carload rates complained of is unjustly discriminatory against toasted wheat biscuit and toasted wheat krumbles in favor of cream of wheat, Post tavern porridge, and similar uncooked breakfast foods. For the future defendants will be required to charge for the transportation of toasted wheat biscuit and toasted wheat krumbles in carloads in the territories in question rates not in excess of the rates which govern the transportation of cream of wheat, Post tavern porridge, and like uncooked cereal breakfast foods in carloads."

**GLUCOSE:** Sirup and glucose generally take the same rates. Glucose competes, to some extent, with sirup and molasses. It is used largely in the making of candies, but when mixed with about 20% of fine sirup is used as a table sirup.<sup>32</sup>

**GRANITE, MONUMENTAL:** The classification rating and rates on shipments of monumental granite from quarry points in Vermont to points in Nebraska, applied from the points of origin to the Mississippi River crossings, held to be discriminatory upon comparison with the classification rating, and rates applied by the carriers to dressed and polished building granite; and it is ordered that the carriers shall establish on the monumental granite a rate and rating not in excess of those contemporaneously applied to the building granite.<sup>33</sup>

**HAY AND STRAW:** In *National Hay Assn. v. Lake Shore & M. S. Ry. Co.*<sup>34</sup> involved the legality of the change by the defendants in the classification of hay and straw in carloads from the fifth class to the sixth class, and the increased cost of transportation resulted from

the application of the higher fifth class rates. Among other things the complainant alleged the advanced classification of rates to be unjust and unreasonable, and to give undue and unreasonable advantage to the production, sale and shipment of grain and grain products, all kinds of stock foods, and other articles capable of being used in place of hay or straw. The Commission ordered the defendants to desist from charging the fifth class rates upon hay or straw and required them to apply sixth class rates thereon, which order was not obeyed by the defendants. Thereafter the Commission filed a bill in the United States Circuit Court in the Northern District of Ohio, Eastern Division, against four of the said original defendant railroad companies to enforce its order. Most of the other railroad companies, defendants to the original petition, intervened as defendants, and thereafter on January 7, 1905, the court entered a decree dismissing the bill of complaint, which decree was affirmed on appeal by a divided court in the Supreme Court of the United States on May 21, 1906.

Again on June 10, 1910, complaint was filed with the Commission attacking the reasonableness of the fifth class rates on hay and straw to which complaint the defendants answered and pleaded *res judicata*. The Commission held that fifth class rates on hay and straw are not now unreasonable or discriminatory, but held that in rate matters the plea of *res judicata* is only valid as to what preceded the final decree of the court or the final order of the Commission and that it cannot apply to present rates.<sup>35</sup>

**HEADINGS AND STAVES:** Whatever may be true when staves are compared with lumber of a lower grade, there is no reason why staves and headings should not be accorded as low a rate as is applied to hardwood lumber.<sup>36</sup>

**HIDES AND PELTS:** The inherent characteristics of hides and pelts, many of which are matters of common knowledge, are not such as to justify any higher rate than on packing house products. They load heavily. The risk of loss or damage is comparatively slight; they can be loaded in any kind of box cars and no expedited service is required.<sup>37</sup>

**ICE:** In transportation, ice competes with no other commodity.<sup>38</sup>

**IRON, SCRAP:** Scrap iron rates should not necessarily be fixed with a definite relation to the rates on pig iron or new rails.<sup>39</sup>

**JACKS, AUTOMOBILE:** In *Chevrolet Motor Co. of California, Director General, as Agent*,<sup>40</sup> the Commission stated: "Complainant, a corporation, engaged in the automobile business at Oakland, Calif., by complaint filed February 21, 1921, alleges that the third-class rates charged on less-than-carload shipments of automobile jacks from Ashland, Ohio, and Joliet, Ill., to Oakland, (Melrose), Calif., since January 4, 1918, were and are unreasonable and unjustly discriminatory. We are asked to prescribe commodity rates on this traffic and to award reparation."

"The automobile jack is a mechanical contrivance made of iron and used for the lifting of automobiles. Transportation charges were collected on complainant's shipments upon the basis of the third-class rates applicable on jacks, or jack screws, not otherwise indexed by name, not mounted on trucks, less-than-carloads. During the period of

movement commodity rates were in effect on tools, the description including jacks, wagon, boxed or crated. These commodity rates were cancelled March 15, 1921. Complainant seeks to have them restored and made applicable to automobile jacks, with reparation to that basis.

"At the hearing, it was stated on behalf of complainant that it did not attack the class rates and rating as unreasonable, but that the issue was whether the commodity rates were applicable on shipments of automobile jacks.

"Defendants' witnesses contended that the tariffs naming the commodity rates on wagon jacks covered only the commodities specifically named. They testified that the wagon jack is a simple contrivance made of wood; that the automobile jack is more complicated in construction; and that the commodity rate formerly in effect had been established for the movement of jacks to be used for horse-drawn vehicles, and was abnormally low. Numerous commodities which move under class rates in less-than-carload quantities were mentioned.

"Complainant's shipments fall within the description jacks or jack screws and not jack wagon. The commodity description was neither misleading nor indefinite, as the term wagon is commonly accepted as applying to a vehicle which is not self-propelled. The evidence is not persuasive that less-than-carload shipments of automobile jacks should move under commodity rates.

"We find that the rates charged were applicable and not unreasonable or unjustly discriminatory. The complaint will be dismissed."

*LABELS, PAPER:* Paper labels should take the same rate as paper wrappers or printed wrapping paper.<sup>41</sup>

*LEATHER:* In the case of *Chamber of Commerce, Freight Bureau, Macon, Ga. v. Cincinnati, N. O. & T. P. Ry. Co.*<sup>42</sup> the Commission held that the existence of lower carload rates on shoe-sole leather than on raw leather suitable for use in the manufacture of harness, bridles, and horse collars to Macon, Ga., from the Ohio and Mississippi River crossings and the Gulf ports not found to result in undue prejudice and disadvantage to the shippers of the latter.

*LIME-SULPHUR SOLUTION:* The rate on lime-sulphur solution from Pullman Junction, Ill., to Portland, Ore., found unreasonable to the extent that it exceeded the rate on liquid sheep dip.<sup>43</sup>

In its report, the Commission said:<sup>44</sup>

"Having been recognized and approved as a sheep dip as well as an orchard spray, if the shipment had been billed as 'liquid sheep dip' instead of 'lime-sulphur solution,' the inspector could have changed the billing only upon knowledge of the use to which the commodity was to be put. The Commission has consistently condemned the maintenance of different rates upon the same commodity dependent upon the use thereof, and in this case it is held that the same rate should apply on 'lime-sulphur solution, inv. val. not exceeding 6 cents per pound,' as on 'liquid sheep dip, inv. val. not exceeding 6 cents per pound,' and on the same minimum basis of 30,000 pounds. The invoice value of the shipment in question was considerably less than 6 cents per pound."

*"LINOMEAL":* "Linomeal" is made by a concern in Minneapolis out of the screenings of wheat, oats and barley purchased in various mills in the northwest and Canada. By a cleaning process any grains or seeds of value are first removed from the screenings. The remainder, consisting largely of weed seeds, is then ground and the product is sold under the trade name mentioned. The Commission

held that this commodity should properly be accorded the rates applicable on grain screenings.<sup>45</sup>

**LIVE STOCK:** In *National Society of Record Assn. v. Aberdeen & R. Rd. Co.*<sup>46</sup> the Commission fully considered the question of the standard or basic values of live stock and the question of their classification for transportation purposes. This subject is fully treated under "*Transportation of Live Stock,*" Chapter 31, post.

For a consideration of the validity of higher rates on live stock than on dressed meats and packing-house products, see subject of "*Dressed meats and packing-house products,*" *supra*.

**LUMBER:** In *Oregon & Washington Lumber Manufacturers Assn. v. Southern P. Co.*<sup>47</sup> the Commission said: "Ordinarily the same rate is applied to all lumber without reference to its value or conditions, and this rate frequently includes not only manufactured lumber, but articles made from it, like doors, sashes, blinds, etc. To this general rule exceptions are sometimes made by the carriers themselves whenever the exigencies of a particular case require it; and without suggesting that any general departure from the general rule would be desirable or reasonable we see no reason why, in particular cases, lumber may not preferably be subjected to a further classification."

With reference to the classification of hardwoods, the Commission in the case of *Bluegrass Lumber Co. v. Louisville & N. Rd. Co.*<sup>48</sup> stated: "Generally speaking, the rates on hardwoods, not including therein cedar, cherry, walnut, or other woods of value, should not be much if at all higher than the rates on yellow pine, white pine, or similar lumber. Many of the tariffs filed with this Commission make no distinction in their lumber rates except as between ordinary lumber and woods of value, and this seems to be a desirable classification."

**LUMBER PRODUCTS AND BUILDING MATERIALS:** If it is just and reasonable that lumber and lumber products take the same rate in one territory, it must be unjust and unreasonable or unjustly discriminatory to maintain and charge a differential in the rates on these respective classes of traffic in another territory, unless the difference in treatment of the same products in different territories has been clearly established by affirmative testimony. If it is impracticable to establish a lumber list, complete or partial, in one territory, it must be equally impracticable to do so in another territory. In other words, carriers should effect uniformity in treatment in the classification of lumber and lumber products throughout the country.<sup>49</sup>

In *Yellow Pine Sash, Door & Blind Mfrs. Assn. v. Southern Ry. Co.*<sup>50</sup> the Commission said: "Greater uniformity and a new rate relationship between lumber and its products, based upon more scientific principles, are necessary. Following the cases cited and the principles therein announced, and from all the facts and circumstances of record, we are of the opinion that the rates on building material here involved should bear a uniform relation to the lumber rates.

"We come now to the question of what this relationship should be or what is a reasonable differential for building material over lumber. The basis for this principle, as announced in the several cases cited, is that the elements which determine the classification of building

material bear a fixed relation to the elements which determine the classification of lumber. The question, therefore, necessarily resolves itself into one of classification. Complainants, however, have introduced no evidence that is of material assistance in determining this issue. They have relied upon our decisions applicable in other territories and upon the existence of rates on building material differentials over lumber in certain parts of the south. The evidence tending to show the value, loading and volume of the movement of building material as compared with lumber is very indefinite and in certain instances conflicting. To justify a finding as broad as is asked by complainants definite evidence must be adduced on these material points. Neither complainants nor defendants have filed briefs in this case, and, with no satisfactory evidence in the record as to what would be reasonable differentials, it has been left to us to work out a relationship. This we cannot undertake. The burden is upon the complainants not only to prove that there should be a fixed relationship between rates on lumber and on building material, but to show what the reasonable differentials would be. This they have not done."

*MACHINES: ADDRESSING, PRINTOGRAPHS, WRITER-PRESSES, AND PLAINOTYPES:* The Commission has held that these articles from LaCrosse, Wisc., and Chicago, Ill., to Portland, Ore., are entitled to as low a rate as multigraphs.<sup>51</sup>

*MALT:* Ordinarily the rate on malt is the same as that upon grain products, and this is sometimes the same as the grain rate, and sometimes slightly higher.<sup>52</sup>

The rate on malt may properly be higher than the rate on barley from which it is manufactured.<sup>53</sup>

*MOLASSES—“BLACKSTRAP”:* In *Molasses Rates to Knoxville, Tenn.*<sup>54</sup> the proposed domestic rate of 33 cents per 100 pounds on “Blackstrap” in carloads being the same rate which governs the transportation of all other molasses, from New Orleans, La. to Knoxville, Tenn. found to be justified. In this proceeding the Commission stated: “Blackstrap molasses is a sugar-cane product of low grade, containing less sugar than the higher grade of molasses, and is used very largely as a sweetening in the manufacture of mixed feeds for animal use. The protest herein is on behalf of a manufacturer of such feeds at Knoxville. Blackstrap is also used to some extent for human consumption interchangeably with higher grades of molasses, and as an ingredient in the manufacture of certain articles of food for man. Its value is less than that of the lowest grade of table molasses, and not more than 25 per cent of the value of the highest table grade. Whether the ordinary observer or an inspector can distinguish blackstrap from the other grades of molasses is in dispute in this record. The practical difficulty in determining with certainty whether any given shipment, when made, is of one grade or another, is a reason, although not controlling, for applying the same rate to all grades.”

*MOTORCYCLES:* There is no transportation reason for maintaining a less-than-carload rate on motorcycles in excess of that on bicycles.<sup>55</sup>

*NAPHTHA:* Naphtha is a generic term referring to petroleum distillates that are heavier than gasoline and lighter than kerosene, and includes refined, crude, and heavy naphtha.<sup>56</sup>

*OIL, FLAXSEED:* The manner of shipment, the tonnage and the value, as well as the commercial conditions affecting the shipment of flaxseed oil and linseed oil are so different that their rates have no necessary relation to each other.<sup>57</sup>

*OIL, FUEL:* While fuel oil may, to a certain extent, be used in place of coal, the circumstances and conditions surrounding the movement of these commodities are so dissimilar that comparisons of this nature are not of great value.<sup>58</sup>

In *Fairmont Creamery Co. v. Atchison, T. & S. F. Ry. Co.*<sup>59</sup> the Commission stated: "The rates assailed having been increased since January 1, 1910, the burden of proof to show that they are just and reasonable is upon defendants. They maintain that a question of classification only is involved, and their evidence, which is addressed principally to that issue, shows that fuel oil is classified with the higher grade oils at fifth class in the official, the western, the Illinois, and the Iowa classifications; that to Omaha from all producing points except Casper, Wyo., fuel oil is rated the same as are high-grade oils; that fuel oil is a refined product similar to kerosene, which latter commodity is also used for fuel in some instances; and that road oil, a residual product, and fuel oil are used for different purposes and hence are not competitive.

"The physical characteristics of road oil and fuel oil, the uses to which they may be put, and the propriety of rating them the same as the higher grade oils have been considered in other cases. In *Central Commercial Co. v. A., T. & S. F. Ry. Co.*, 26 I. C. C. 373, 375, we said:

"Residuum or road oil is the residue from crude petroleum, after the higher and more volatile oils have been extracted. It is used by pavers and roofers for fluxing solid asphalt, in road construction for dust-laying purposes, or as a binder for macadam roads, and for fuel purposes where high-grade oils cannot be used on account of their cost. It is heavy, black, and nontransparent \* \* \*."

"Our report in *National Petroleum Asso. v. A., T. & S. F. Ry. Co.*, 37 I. C. C. 287, 289, 292, 293, stated:

"So far as this record indicates, the term "fuel oil" is applied in the trade to any oil that may be used in a furnace for heating metal or under a boiler for making steam. In rate cases fuel oil may be a distillate, but more frequently it is a residual product; in the latter case it may be refined or it may consist of the dregs of residuals. Oil used for fuel purposes may also be used to lay dust on streets or road, to flux asphalt, and for a large number of other purposes."

\* \* \* \* \*

"As a matter of fact no product of petroleum can be singled out as being fuel oil only. Only petroleum product that may be made liquid by steam and pumped from tank cars for burning or that can be used in a furnace for heating metal or under a boiler for making steam is a fuel oil. Oil sold for road purposes may be a fuel oil in the sense that it can be used also for fuel purposes; on the other hand, oil sold for fuel oil may not infrequently be entirely suitable also for road and other purposes."

\* \* \* \* \*

"No line can be drawn between fuel oil and the residual products of complainants' refineries. No inspector could determine by an examination of the complainants' shipments whether the oil contained in them was fuel oil, road oil, or tailings. The various oils look alike, are of the same consistency, and are produced by the same method. If the use to which the tailings may be put defines what it is, then it would quite as often be road oil as fuel oil, or it might prove to be any one of the numerous other oils known to the trade and used for various purposes. It is now well settled by our decisions, and no other finding is practicable, that we cannot undertake to determine whether a rate is reasonable or unreasonable by ascertaining to what use the product shipped is put, and the carriers must adjust their tariffs in conformity with that principle."

"And, in *Fairmont Creamery Co. v. A., T. & S. F. Ry. Co.*, 28 I. C. C. 661, 662, we said:

"The tendency of the Commission in recent cases has been to classify the various petroleum products to a limited extent and to establish lower rates on such low-grade products as fuel oil, etc., than are contemporaneously maintained on the higher grade of products, such as gasoline, kerosene, naphtha, etc."<sup>60</sup>

**PAPER, WRAPPING:** The paper stock rate which is accorded to manila paper was established to apply to all articles which enter into the manufacture of paper itself. Wrapping paper, the product of a manufacturing operation, cannot properly be so classed.<sup>61</sup>

**PEACHES:** See "*Cantaloupes*."

**PELTS:** See "*Hides and Pelts*."

**PETROLEUM AND PETROLEUM PRODUCTS:** In *Nashville Refining Co. v. Cleveland C. C. & St. L. Ry. Co.*<sup>62</sup> the Commission stated: "Complainant also contends that a rate lower than 13½ cents, which applies to petroleum and its products, should be established for the carriage of crude petroleum in accordance with the general rule that raw material should be carried at a lower rate than its finished product. This is a well-established theory of rate making and has been generally approved by the Commission; but there are exceptions to it, a well-known instance being that of the rates on wheat and flour, which commodities, because of commercial conditions, are ordinarily carried at the same rate. For many years in official classification territory petroleum and its products have been given the same rates. Although refined oil is more valuable than crude petroleum, there are a number of by-products of petroleum which are of small value, and we are not now prepared to say that, on the whole, the practice of charging the same rate on petroleum and its products is improper."

**PIPE, IRON AND STEEL:** Wrought, cast and riveted pipe can be, and frequently are, used for the same purposes; riveted pipe for certain uses is sold in competition with wrought pipe; but all iron or steel pipe are loaded in substantially the same manner and in the same kind of equipment; and there are, therefore, both commercial and transportation relations between them.<sup>63</sup>

**PLOW BEAMS AND WAGON WOOD:** The Commission has held that it is unjustly discriminatory to force wagon wood and plow beams, in the rough, to bear higher rates than are imposed for like service upon many analogous manufactured wood articles which move at lumber rates.<sup>64</sup> Through rate charged for the transportation of a carload of wagon felloes in the rough from Achille, Okla., to Florence, Ala., found unreasonable to the extent that the rate charged for the portion of the haul from Memphis, Tenn., to Florence exceeded the rate concurrently in effect on lumber.<sup>64</sup>

**POLES, POSTS, AND PILINGS:** The rule that a transportation charge for posts and poles shall not exceed that applied to sawed lumber seems to grow out of the character of the commodities themselves. But there is no competitive reason why the rate upon the two commodities should be the same.<sup>65</sup> There is no universal rule to the effect that rates on poles and pilings should not exceed the lumber rate.<sup>66</sup>

**POULTRY, LIVE:** The relationship between the rates on live and dressed poultry was relied upon to show the unreasonable and prejudicial character of the rates of the former. It was shown that

the percentage of empty-car movement was higher in the case of live poultry than of dressed poultry; that 13 per cent of the live fowl is lost in dressing. Live poultry competes in the market with dressed poultry and, to an extent, with all kinds of food products. There is, however, a special demand for live poultry which cannot be met by dressed poultry, or by any other dressed meat. Rates on dressed meats and live stock are lower than on live poultry, but differences in the amount and character of movement are such that the rates on the former cannot be used as gauges of reasonableness.<sup>67</sup>

*RADIATORS, GAS-HEATING:* Gas-heating radiators compete with ordinary steam radiators and should be accorded the same rates.<sup>68</sup>

*RICE:* In *Rice from Texas and Louisiana*<sup>69</sup> the Commission stated: "Comparisons are made with rates on sugar and green coffee, two other food products of about the same value as rice. Sugar loads somewhat heavier than rice. The transportation hazard, actual or relative, cannot be measured on this record. One carrier shows the amount paid by it for loss and damage to rice, but this fact is of little aid, as the quantity shipped is not shown. One shipper has experienced nominal damage to rice shipments and greater damage to sugar.

"Comparisons of rates on these three commodities are proper and were relied on by protestants as well as respondents."

Mahogany lumber, lumber, alcohol and turpentine are commodities not sufficiently similar to rice to justify an analysis of the same in comparisons.<sup>70</sup>

*ROSIN:* Rosin moves in barrels in ordinary box cars and is hauled with little risk. Owing to difference in value and tonnage it is not fairly comparable with lumber and forest products.<sup>71</sup>

*SASHES:* See "*Blinds, Doors, and Sashes.*"

*SAND, MOLDING:* Molding sand differs from ordinary sand in that from 40 to 50 per cent of it consists of clay and is free from gravel. There is no competition between crushed stone and molding sand.<sup>72</sup>

*SHINGLES:* The Commission has held that the rate on shingles should not exceed rates on lumber.<sup>73</sup>

*SHOOKS, BOX:* The Commission has found that the rate on box shocks between certain points in excess of the current rate on yellow pine lumber between the same points is unreasonable.<sup>74</sup>

*SLAG:* Comparison of rates on slag with those on crushed stone is of interest because both commodities are used in road construction and concrete work, and because their transportation characteristics are somewhat similar.<sup>75</sup>

*SOAP:* In *Andrews Soap Co. v. Pittsburgh C. C. & St. L. Ry. Co.*<sup>76</sup> the Commission stated: "In this case, if the soap of the complainant, which is represented as a toilet soap, is in fact of no greater value or cost of production than the common soap with which it comes in competition, the discrimination complained of in respect to the classification and rate could readily be obviated by putting it on the market and having it transported as a common or laundry soap. But

in answer to this suggestion it was said on the hearing that the trade name of the complainant's soap is essential to the selling of the product, that it must be sold as a toilet soap, and that the complainant cannot afford, by extensive advertising, to create the demand for it that is necessary to make its manufacture profitable, except as a toilet soap.

\* \* \* A manufacturer's description of an article to induce its purchase by the public also describes it for transportation, and carriers may accept his description for the purpose of classification and rates. Carriers are not required to analyze freight, to ascertain whether it is in fact inferior to the description or public representations under which it is sold, in order to give it a lower rate corresponding to its actual value."

*SPELTER:* Spelter rate has no bearing upon the scrap-iron business. Therefore, no discrimination against scrap iron can result from a lower rate on spelter, unless the rate on spelter is so low as to be unremunerative.<sup>77</sup>

*SPOKES, CLUB-TURNED:* Higher rate on club-turned spokes than on lumber should not be exacted on the ground that there is a great amount of waste in the manufacture of club-turned spokes, which results in a great saving of freight to the consumer and a loss of tonnage to the carrier.<sup>78</sup>

*STAVES:* See "Headings and Staves."

*STONE, CRUSHED:* Crushed stone has about twice the value of sand and gravel, and as it does not load quite as heavily, a rate on that commodity slightly higher than on sand and gravel would seem to be justified.<sup>79</sup>

*STRAW:* See "Hay and Straw."

*SUGAR:* Lower rate maintained from New Orleans on refined sugar which is the most valuable product obtained from cane than on "blackstrap," which is the residue of least value from the manufacture of sugar, held reasonable.<sup>80</sup> Sugar and molasses are not preferably comparable since they differ, not only in their inherent characteristics, but in the circumstances and conditions affecting and controlling their transportation.<sup>81</sup>

*TAR, PETROLEUM:* Coal tar is a by-product of coal, while petroleum tar is a by-product of gas oil, both being obtained from gas works. They are similar as to loading and other primary transportation factors and generally take the same rate.<sup>82</sup>

*TAR, REFINED:* In *Monarch Paint Co. v. Chicago, B. & Q. Rd. Co.*<sup>83</sup> the Commission stated: "Refined tar is the liquid residue of crude coal tar, which has been distilled or dehydrated to the extent of eliminating the light oils, ammoniacal liquors, and other substances. It is chiefly used in coating metal surfaces, such as roofing, siding, and pipes, and is usually shipped in steel barrels. This commodity is not manufactured by complainant but is invoiced to it from Chicago as refined tar and without additional process of manufacture is sold by it under the trade name of 'hydrocarbonite' and described both on the barrels and in advertising circulars as a 'high-grade roof and iron paint' \* \* \*."

"Hydrocarbonite is extensively advertised by complainant as paint. The record is not clear regarding the quantitative analysis of the commodity, but complainant's advertising circular, acknowledged as correct, embodies in its description of the properties of hydrocarbonite the statement that 'the basic gums are thoroughly ground and mixed with oil.' It competes with paint of various kinds, and it appears that in reshipping it from the storage warehouses in Portland and San Francisco it is tendered to the railroads as 'paint in oil' and charged the rate applicable to paint.

"Defendants insist that the commodity is in every sense a paint and that the rate of 95 cents was legally applicable. They urge that as complainant has represented, branded, and sold the commodity to the public as paint, the carriers have a right to rely upon such facts as to the nature of the commodity tendered for transportation. In support of this contention they cite *Andrews Soap Co. v. P., C. & St. L. Ry. Co.*, 4 I. C. C. 41, in which we said:

"'When a manufacturer described his article to the public for the purpose of making a market for it, he also so describes it for purposes of carriage, and it seems as reasonable that the carrier should have a right to accept the manufacturer's representation concerning his product as that the public should be influenced by it in the purchase of the article.'

"The same conclusion was in effect reiterated in *Ford Co. v. M. C. R. R. Co.*, 19 I. C. C. 507.

"Upon all the facts of record we find that refined tar or hydrocarbonite, as herein described, is a form of paint falling within the tariff description of articles taking the rates applicable to paint."

*TIES, CROSS:* Rates on hewn oak ties should not exceed rate on oak lumber.<sup>84</sup>

*TURPENTINE:* Turpentine moves principally in privately owned tank cars for which the carrier allows three-quarters of a cent per mile both ways. This commodity is inflammable, is subject to considerable risk, which, under the tariffs, the owner assumes. Owing to the difference in value and tonnage lumber is not comparable with turpentine.<sup>85</sup>

*VENEER:* In *Underwood Veneer Co. v. Ann Arbor Rd. Co.*<sup>86</sup> the Commission stated: "The record establishes that veneer loads about as heavily as lumber, complainant's shipments averaging 47,000 pounds to the 36 foot car; that built-up wood is made by gluing together several layers of veneer or by covering ordinary wood with one or more layers of veneer, is more valuable than veneer, and may fairly carry a higher rate; that lumber, built-up wood, and veneer, except that under one-sixteenth of an inch in thickness, are cut from the same grade of logs; that veneer and built-up wood move in small quantities as compared with lumber; and that the veneer manufactured by complainants is made from the ordinary hardwoods, such as birch, maple, basswood, and ash.

"The defendants contended that, though the present line of demarcation is somewhat arbitrary, to draw it just under one-sixteenth of an inch, as requested by complainant, would be no less arbitrary; and that, were such a change made, a manufacturer of veneer one-twentieth of an inch in thickness could with equal logic ask for yet

another line of division. The record does not sustain complainant's contention that the line should be drawn just under one-sixteenth of an inch. All that it clearly establishes is that the thicker veneers are somewhat less valuable than the thinner grades. A fairer classification might be to apply the same rate to all veneer made from the cheaper woods, regardless of thickness. This is more nearly attained in the southern and western classifications, in which the dividing line is drawn at one-eighth of an inch. It is obvious, however, that such a change would not benefit complainant.

"The operation of the principle that the value of an article is one of the elements to be considered in the determination of a reasonable rate, and articles of higher value even when derived from the same raw materials as those of lower value should carry a higher rate, would seem *prima facie* to lead to the conclusion that veneer and built-up wood should take a somewhat higher rate than lumber.

\* \* \* \* \*

"That veneer loads as heavily as lumber and can be moved at the same cost is not controlling. On the other hand, veneer and built-up wood are more valuable than lumber, and move in much smaller quantities.

"The Commission, in *Penrod Walnut & Veneer Co. v. C. B. & Q. R. R. Co.*, 15 I. C. C. 326, held that walnut veneers were properly classified in the fifth class, and that a rate thereon of 27 cents in carloads from Kansas City to Chicago, a distance of 458 miles, was not unreasonable, the lumber rate between the same points being 16 cents. In this case the relatively high value of walnut veneer was a material consideration influencing the Commission. It would seem that if fifth and sixth class represent, respectively, the proper classifications of veneer and lumber, the spread between these rates from Wausau to points in the southern peninsula of Michigan is reasonable."

*WAGON WOOD:* See "Plow Beams and Wagon Wood."

*WOOL:* The fact that the value of wool is much greater than that of sheep and the rate is a thing of less relative consequence to the producer might justify a somewhat higher rate on wool than on the live animal.<sup>87</sup> Lower rates on wool in bales than on wool in sacks ordered established from far western points to the east.<sup>88</sup>

*WOOD, PULP:* A low grade of traffic should ordinarily take a lower rate than lumber.<sup>89</sup> Pulp wood loads heavily and can be transported in most any kind of cars. It moves in large quantities and helps to create a great deal of other traffic and the liability to damage is slight.<sup>90</sup>

1. Chicago Live Stock Exchange v. Chicago, G. W. Ry. Co. (1905), 10 I. C. C. Rep. 428, 450. See, *In Re Rates on Corn and Corn Products* (1905), 11 I. C. C. Rep. 227; *Edgar & Son. v. Louisville & N. Rd. Co.* (1913), 26 I. C. C. Rep. 181, 184.
2. *Rice v. Cincinnati W. & B. Rd. Co.* (1892), 5 I. C. C. Rep. 193, 3 I. C. Rep. 841.
3. *Chamber of Commerce of the City of Milwaukee v Chicago, M. & St. P. Ry. Co.* (1898), 7 I. C. C. Rep. 481.
4. *Howard Mills Co. v. Missouri P. Ry. Co.* (1907), 12 I. C. C. Rep. 259.
5. *Bulte Milling Co. v. Chicago & A. Rd. Co.* (1909), 15 I. C. C. Rep. 351, 364.
6. *State of Iowa v. Atlanta C. L. Rd. Co.* (1912), 24 I. C. C. Rep. 134, 137.
7. *Stowe-Fuller Co. v. Pennsylvania Co.* (1907), 12 I. C. C. Rep. 216.
8. *Barnard Co. v. Chicago, M. & St. P. Ry. Co.* (1913), 26 I. C. C. Rep. 91, 93.
9. *International Agricultural Corp. v. Louisville & N. Rd. Co.* (1912), 22 I. C. C. Rep. 488, 493.

10. Davis Sewing Machine Co. v. Pittsburgh C. C. & St. L. Ry. Co. (1912), I. C. C. Rep. 291.
11. Oregon & Washington Lumber Mfrs. Assn. v. Southern P. Co. (1911), 21 I. C. C. Rep. 389, 395.
12. Stowe-Fuller Co. v. Pennsylvania Co. (1907), 12 I. C. C. Rep. 216.
- 12½. National Paving Brick Manufacturers' Association v. Alabama & V. Ry. Co. (1922), 68 I. C. C. Rep. 213, 216, et seq.
13. Broom Rates to Colorado Points (1913), 28 I. C. C. Rep. 310, 312.
14. Carnation Milk Products Co. v. Director General, Atchison, T. & S. F. Ry. Co. (1919), 55 I. C. C. Rep. 665, 668.
15. Bahrenburg Bros. & Co. v. Atlantic C. L. Rd. Co. (1912), 24 I. C. C. Rep. 560, 564.
16. Anderson-Tully Co. v. Chicago, R. I. & P. Ry. Co. (1910), 18 I. C. C. Rep. 48.
17. Cement Rates from Duluth, Minn., Mason City and Des Moines, Iowa, to Stations on the Midland Continental Railroad (1915), 32 I. C. C. Rep. 540, 542; Maritime Exchange v. Pennsylvania Rd. Co. (1911), 21 I. C. C. Rep. 81; Ashgrove Lime & Portland Cement Co. v. Atchison, T. & S. F. Ry. Co. (1912), 23 I. C. C. Rep. 519; Little Rock Chamber of Commerce v. St. Louis, I. M. & S. Ry. Co. (1913), 26 I. C. C. Rep. 341.
18. Union Pacific Tea Co. v. Pennsylvania Rd. Co. (1908), 14 I. C. C. Rep. 545, 547.
19. Ford Co. v. Michigan C. Rd. Co. (1910), 19 I. C. C. Rep. 507.
20. Ibid.
21. Meeker & Co. v. Lehigh V. Rd. Co. (1911), 21 I. C. C. Rep. 129, 150.
22. Independent Ice, Feed & Fuel Co. v. San Pedro, L. A. & S. L. Rd. Co. (1917), 44 I. C. C. Rep. 666, 667.
23. Casey-Hedges Mfg. Co. v. Central of Georgia Ry. Co. (1913), 26 I. C. C. Rep. 63, 64.
24. Yawman & Erbe Mfg. Co. v. Atchison, T. & S. F. Ry. Co. (1909), 15 I. C. C. Rep. 260.
25. Peet Bros. Mfg. Co. v. Director General, as Agent, Fort Smith & W. Rd. Co. (1921), 63 I. C. C. Rep. 345, 346. See Chamber of Commerce, Houston, Texas, v. Abilene & S. Ry. Co. (1919), 53 I. C. C. Rep. 645; Southport Mill, Ltd., v. Director General, Chicago & N. W. Ry. Co. (1919), 55 I. C. C. Rep. 154; Procter & Gamble Co. v. Cincinnati, N. O. & T. P. Ry. Co. (1920), 58 I. C. C. Rep. 108.
26. East St. Louis Cotton Oil Co. v. St. Louis & S. F. Rd. Co. (1912), 24 I. C. C. Rep. 588, 591.
27. Commercial Club of Omaha v. Baltimore & O. Rd. Co. (1910), 19 I. C. C. Rep. 397, 402.
28. Interstate Commerce Commission v. Chicago, G. W. Ry. Co. (1908) 209 U. S. 108, 52 L. Ed. 705, 28 Sup. Ct. Rep. 493. This case is known as the "Chicago Live Stock Case," the history of which is as follows: Chicago Live Stock Exchange v. Chicago G. W. Ry. Co. (1905), 10 I. C. C. Rep. 428. From the Missouri River to Chicago, Ill., carriers ordered to discontinue charging higher rates on live stock than on packing-house products on the ground that lower rates on the products constituted an undue preference in favor of the products in violation of section 3 of the Act. Interstate Commerce Commission v. Chicago G. W. Ry. Co. (1905), 141 Fed. Rep. 1003. Commission's order held invalid on the ground that there is no violation of section 3 on account of railroad competition and other transportation dissimilarities. Interstate Commerce Commission v. Chicago G. W. Ry. Co., *supra*. Supreme Court affirmed judgment of lower court and held Commission's order invalid.
29. Carlowitz & Co. v. Canadian P. Ry. Co. (1917), 46 I. C. C. Rep. 290, 291.
30. Keogh v. Chicago, B. & Q. Rd. Co. (1912), 24 I. C. C. Rep. 606.
31. Kellogg Toasted Corn Flake Co. v. Atchison, T. & S. F. Ry. Co. (1915), 33 I. C. C. Rep. 534, 535.
32. Glucose from Chicago (1915), 36 I. C. C. Rep. 379, 381.
33. Nebraska State Railway Commission v. Central V. Ry. Co. (1914), 21 I. C. C. Rep. 41.
34. National Hay Assn. v. Lake Shore & M. S. Ry. Co. (1902), 9 I. C. C. Rep. 264; Commission's order held invalid on the ground that it fixed a rate for the future. Interstate Commerce Commission v. Lake Shore & M. S. Ry. Co. (1905), 134 Fed. Rep. 942. Commission's order held invalid. Decree of lower court affirmed by divided court, there being no written opinion. Interstate Commerce Commission v. Lake Shore & M. S. Ry. Co. (1906), 202 U. S. 613, 26 Sup. Ct. Rep. 766, 50 L. Ed. 1169.
35. National Hay Assn. v. Michigan C. Rd. Co. (1910), 19 I. C. C. Rep. 34.
36. In the Matter of the Investigation and Suspension of Supplements No. 2 to Trans-continental Freight Bureau Westbound Tariffs No. 1-L and No. 4-H (1911), 21 I. C. C. Rep. 397, 399.
37. Crowders Bros. v. Atchison, T. & S. F. Ry. Co. (1914), 29 I. C. C. Rep. 449; Rate Increases in Western Classification Territory (1915), 35 I. C. C. Rep. 497, 602.
38. City Ice & Supply Co. v. Chicago & N. W. Ry. Co. (1916), 36 I. C. C. Rep. 514, 516.
39. Scrap-Iron Rates between Duluth, Minn., and Chicago, Ill., and Other Points (1913); 28 I. C. C. Rep. 467, 470.
40. Chevrolet Motor Co. of California v. Director General, as Agent (1922), 66 I. C. C. Rep. 677, et seq.
41. Pacific Creamery Co. v. Southern P. Co. (1913), 26 I. C. C. Rep. 578, 580.
42. Chamber of Commerce, Freight Bureau, Macon, Ga. v. Cincinnati, N. O. & T. P. Ry. Co. (1914), 30 I. C. C. Rep. 477.
43. Hardie Mfg. Co. v. Oregon Rd. & Nav. Co. (1912), 24 I. C. C. Rep. 545, 546.
44. Bernheim & Co. v. Oregon Rd. & Nav. Co. (1912), 25 I. C. C. Rep. 156, 158.
45. Tarkio Molasses Feed Co. v. Chicago, B. & Q. Rd. Co. (1917), 46 I. C. C. Rep. 17, 19.
46. National Society of Record Assns. v. Aberdeen & R. Rd. Co. (1916), 40 I. C. C. Rep. 347, 351.
47. Oregon & Washington Lumber Mfrs. Assn. v. Southern P. Co. (1911), 21 I. C. C. Rep. 389; Farrar Lumber Co. v. Nashville C. C. & St. L. Ry. Co. (1912), 25 I. C. C. Rep. 22, 25.

48. Bluegrass Lumber Co. v. Louisville & N. Rd. Co. (1913), 26 I. C. C. Rep. 438, 444.
49. Anson, Gilkey & Hurd Co. v. Southern P. Co. (1915), 33 I. C. C. Rep. 332.
50. Yellow Pine Sash, Door & Blind Mfrs. Assn. v. Southern Ry. Co. (1915), 35 I. C. C. Rep. 150, 155, et seq.
51. Pacific Stationery & Printing Co. v. Oregon-Washington Rd. & Nav. Co. (1912), 24 I. C. C. Rep. 299, 300.
52. Grain Rates in Central Freight Association Territory (1913), 28 I. C. C. Rep. 549, 551.
53. Texas Brewing Co. v. Atchison, T. & S. F. Ry. Co. (1911), 21 I. C. C. Rep. 171, 174.
54. Molasses Rates to Knoxville, Tenn. (1914), 30 I. C. Rep. 613.
55. Rose v. Boston & A. Rd. Co. (1910), 18 I. C. C. Rep. 427, 429.
56. Bayway Chemical Co. v. Central Rd. Co. of New Jersey (1917), 46 I. C. C. Rep. 424, 425.
57. In the Matter of the Investigation and Suspension of Advances in Rates by Carriers for the Transportation of Flaxseed from Minneapolis, Minn., and Other Points to Chicago, Ill., and Other Destinations (1912), 25 I. C. C. Rep. 337, 341.
58. Fairmont Creamery Co. v. Atchison, T. & S. F. Ry. Co. (1913), 28 I. C. C. Rep. 661, 662.
59. Fairmont Creamery Co. v. Atchison, T. & S. F. Ry. Co. (1917), 43 I. C. C. Rep. 515, 517.
60. Paper Rates from Manitowoc and Milwaukee to Kaukauna, Wis. (1913), 28 I. C. C. Rep. 305, 307.
61. National Refining Co. v. Cleveland, C. C. & St. L. Ry. Co. (1911), 20 I. C. C. Rep. 649, 650.
62. Vulcan Iron Works Co. v. Atchison, T. & S. F. Ry. Co. (1916), 41 I. C. C. Rep. 76, 79.
63. Sligo Iron Store Co. v. St. Louis & S. F. Rd. Co. (1913), 28 I. C. C. Rep. 616, 618.
64. Florence Wagon Works v. Missouri, O. & G. Ry. Co. (1915), 36 I. C. C. Rep. 650.
65. Partridge Lumber Co. v. Great N. Ry. Co. (1909), 17 I. C. C. Rep. 276, 278.
66. California Pole & Piling Co. v. Southern P. Co. (1913), 27 I. C. C. Rep. 669, 672.
67. Live Poultry & Dairy Shippers' Traffic Assn. v. Atchison, T. & S. F. Ry. Co. (1918), 49 I. C. C. Rep. 228, 236.
68. Gas & Electric Appliance Co. v. Atchison, T. & S. F. Ry. Co. (1917), 46 I. C. C. Rep. 440, 441.
69. Rice from Texas and Louisiana (1916), 40 I. C. C. Rep. 285, 288.
70. Ibid.
71. Barber Agency Co. v. Kentwood & E. Ry. Co. (1917), 46 I. C. C. Rep. 524.
72. Fargo Foundry Co. v. Northern P. Ry. Co. (1916), 38 I. C. C. Rep. 693, 694.
73. Michigan Box Co. v. Flint & P. M. Rd. Co. (1895), 6 I. C. C. Rep. 335; Duluth Shingle Co. v. Duluth S. S. & A. Ry. Co. (1905), 10 I. C. C. Rep. 489.
74. Sawyer & Austin Lumber Co. v. St. Louis, I. M. & S. Ry. Co. (1910), 19 I. C. C. Rep. 141.
75. State of Maryland v. Baltimore, C. & A. Ry. Co. (1918), 49 I. C. C. Rep. 681, 688.
76. Andrews Soap Co. v. Pittsburgh C. C. & St. L. Ry. Co. (1890), 4 I. C. C. Rep. 31, 3 I. C. Rep. 77.
77. Bartlesville Salvage Co. v. Missouri, K. & T. Ry. Co. (1912), 25 I. C. C. Rep. 672.
78. Eastern Wheel Mfrs. Assn. v. Alabama & V. Ry. Co. (1913), 27 I. C. C. Rep. 370, 380.
79. Waukesha Lime & Stone Co. v. Chicago, M. & St. P. Ry. Co. (1913), 26 I. C. C. Rep. 515.
80. Molasses Rates from Mobile, Ala., (1914), 28 I. C. C. Rep. 666, 670.
81. Molasses from Texas and Louisiana (1916), 40 I. C. C. Rep. 435, 443.
82. Lewis Mfg. Co. v. Chicago, B. & Q. Rd. Co. (1916), 41 I. C. C. Rep. 671, 673.
83. Monarch Paint Co. v. Chicago, B. & Q. Rd. Co. (1918), 49 I. C. C. Rep. 367, 368, 369.
84. Mercantile Lumber & Supply Co. v. St. Louis S. W. Ry. Co. (1913), 28 I. C. C. Rep. 701, 702; Switzer Lumber Co. v. Alabama & M. & Rd. Co. (1912), 22 I. C. C. Rep. 471, 475; Continental Lumber & Tie Co. v. Texas & P. Co. (1910), 18 I. C. C. Rep. 129, 131.
85. Barber Agency Co. v. Kentwood & E. Ry. Co. (1917), 46 I. C. C. Rep. 523, 524.
86. Underwood Veneer Co. v. Ann Arbor Rd. Co. (1914), 32 I. C. C. Rep. 265.
87. In the Matter of the Investigation of Alleged Unreasonable Rates and Practices involved in the Transportation of Wool, Hides, and Pelts from Various Western Points of Origin to Eastern Destinations (1912), 23 I. C. C. Rep. 594, 595.
88. Ibid.
89. Wisconsin Pulp Wood Co. v. Great N. Ry. Co. (1912), 22 I. C. C. Rep. 594, 595.
90. Pulp & Paper Mfrs. Traffic Assn. v. Chicago, M. & St. P. Ry. Co. (1913), 27 I. C. C. Rep. 83, 96.

#### 610-U. COMPARISON OF RATES ON RAW MATERIALS AND MANUFACTURED PRODUCTS.

The general rule is that manufactured products bear higher rates of transportation than does raw material, and it is founded in reason, because ordinarily there is a substantial difference between the value of the one and that of the other, and frequently there is a greater degree of risk incident to the transportation and care of the manufactured product than of the raw material. The practice, however, is not universal, and is departed from in some instances because of the

reasons for the distinction are lacking, and in other cases because of countervailing commercial and market conditions and considerations. Within the last-named class of exceptions to the general rule perhaps would fall the case of grain and grain products, which are for the most part carried at the same rate. A frequent exception to the first named class is in cases where from a single raw material like cottonseed there are several resulting distinct products and by-products, widely differing in value, weight, bulk, and the uses to which they are put. The general practice referred to more nearly universally applies with respect to the primary or principal product or products than to the secondary products or by-products from the same raw material. The primary purpose of crushing cottonseed is to extract the oil, which is by far the most valuable product, and the rates thereon are universally higher than on the cottonseed from which it is produced. Cottonseed meal and cake are approximately of the same value as the seed, and are generally carried at the same or only slightly lower rates, whereas the lower grade by-products, hulls, and linters, are transported at still lower rates.<sup>1</sup>

Sulphuric acid is purely a raw material in the manufacture of fertilizer and a distinctly lower rate should be applied to its transportation than upon manufactured fertilizer.<sup>2</sup>

The rate on malt may preferably be higher than the rate on barley from which it is manufactured.<sup>3</sup>

1. East St. Louis Cotton Oil Co. v. St. Louis & S. F. Rd. Co. (1910), 20 I. C. C. Rep. 37, 40, 41; Bulte Milling Co. v. Chicago & A. Rd. Co. (1909), 15 I. C. C. Rep. 351, 364; Massee & Felton Lumber Co. v. Southern Ry. Co. (1912), 23 I. C. C. Rep. 110, 112; Electric Malting Co. v. Atchison, T. & S. F. Ry. Co. (1912), 23 I. C. C. Rep. 378, 380; McClung & Co. v. Louisville & N. Rd. Co. (1912), 23 I. C. C. Rep. 414, 416; State of Iowa v. Atlantic C. L. Rd. Co. (1912), 24 I. C. C. Rep. 134, 137; East St. Louis Cotton Oil Co. v. St. Louis & S. F. Rd. Co. (1912), 24 I. C. C. Rep. 588; Kellogg Toasted Corn Flake Co. v. Michigan C. Rd. Co. (1912), 24 I. C. C. Rep. 604, 606; In the Matter of the Investigation and Suspension of Advances in Rates by Carriers for the Transportation of Linseed Oil from St. Paul, Minn., and Other Points to Chicago, Ill., Kansas City, Mo., and Other Points (1913), 26 I. C. C. Rep. 265, 270; Capital Electric Co. v. Baltimore & O. C. T. Rd. Co. (1913), 26 I. C. C. Rep. 472, 473; Boldt Co. v. Chicago, R. I. & P. Ry. Co. (1913), 27 I. C. C. Rep. 11, 13; Eastern Wheel Manufacturers Assn. v. Alabama & V. Ry. Co. (1913), 27 I. C. C. Rep. 370, 379; Paper Rates from Manitowoc and Milwaukee to Kaukauna, Wis. (1913), 28 I. C. C. Rep. 305.
2. International Agricultural Corporation v. Louisville & N. Rd. Co. (1912), 22 I. C. C. Rep. 488, 493.
3. Texas Brewing Co. v. Atchison, T. & S. F. Ry. Co. (1911), 21 I. C. C. Rep. 171, 174

#### 610-V. RATES FIXED BY STATE AUTHORITIES AS STANDARDS IN FIXING INTERSTATE RATES.

A railroad is not bound to accept the schedule of rates established by State authority as the measure of its charges on interstate traffic.<sup>1</sup>

Neither is the Interstate Commerce Commission, whose jurisdiction is exclusive over interstate rates, controlled by the rates established by State Railroad Commissions.<sup>2</sup>

While upon general principles of comity the action of a State Commission in fixing a rate on State traffic must be treated with all due respect, the Commission has never felt itself bound to accept a State-made rate as a necessary measure of an interstate rate.<sup>3</sup>

mission is asked to examine the reasonableness of an interstate rate, similar rates, established by State authority in that territory, must have great influence, especially when they have been acquiesced in by carriers. Still these State rates have no binding force upon the Commission. They are standards of comparison of greater or less value, according as they appear to be just and reasonable.<sup>4</sup>

Rates established by State authority are presumed to be reasonable, but the same presumption also attaches to rates voluntarily established by carriers, and in proceedings before the Commission, no greater sanctity can be presumed in favor of rates established by a State commission than those voluntarily established by carriers,<sup>5</sup> and the Commission would not hesitate, upon proper evidence that a rate so established would be unjust either to a carrier or a shipper, to refuse to accept it as a basis for fixing an interstate rate.<sup>6</sup>

In *Corporation Commission of Oklahoma v. Atchison, T. & S. F. Ry. Co.*<sup>7</sup> the Commission stated: "The complainants rely largely upon the fact that different charges are made on intrastate and interstate passenger travel, and the suggested solution would make the state rates the absolute measure of the interstate rate. This proposed solution of the problem presented we may not adopt under the law as announced in the decision of the Supreme Court in the *Shreveport case, infra*.

"In *L. & N. R. R. Co. v. Eubank*, 184 U. S. 27, 42, the Supreme Court said:

"Congress does not directly or indirectly interfere with local rates by adopting their sum as the interstate rate."

"As said in *Pulp & Paper Mfrs. Traffic Asso. v. C., M. & St. P. Ry. Co.*

"We have always given due consideration to rates established by state commissions."

"That rates established by state laws or state authorities, prescribing the charge for intrastate transportation of persons and property, are facts that we consider, and that we respect the authority establishing such rates constitute no valid reason relieving us from performing the duties devolving upon the Commission under the Constitution and laws of the United States. The Constitution of the United States reserves to Congress the power to regulate interstate commerce, and Congress, under this grant of authority, has imposed upon this Commission certain duties. If any rate for transportation wholly within a state may be made the measure of the rates when that transportation moves from one state through or into another, the interstate rate so resulting would not be regulation of interstate commerce by the authority prescribed by the Constitution, but by the state. If the function of this Commission be to compute the sum of intrastate rates and prescribe the result as a measure of the interstate rates, actual and direct regulation of interstate commerce by the states would be the result. That in the regulation of interstate commerce by the general government and of intrastate commerce by the state governments there result inconveniences and anomalies, such as is contended to exist here, might be conceded; but such facts, if they exist, neither deprive us of the power nor relieve us from the duty of performing the obligations im-

posed upon us by laws of Congress authorized by the Constitution of the United States.

"Were we at liberty and inclined to abdicate the authority and abandon the duty imposed upon us by accepting the sum of state rates as a measure of interstate rates, the difficulty would not be removed. If the contention of complainants were made effective by applying the intrastate rates to interstate travel, the passenger fare from New York City to Dallas, Tex., would be reduced 10 per cent, though the passenger might not travel through either of the complaining states, but through New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Louisiana and Texas, and though these states might prefer that passenger fares be not lowered, they desiring to get the benefit of reductions, if there should be such, in the revenues of the carriers by lower freight rates. The policy of Oklahoma would directly affect the revenues a Virginia carrier would receive, though the policy of Virginia might not accord with that of Oklahoma.

"The facts here of record show that in all the complaining states there are roads which may charge a passenger fare in excess of 2 cents a mile. No evidence is before us, unless the mere fact that such a difference exists should be regarded as evidence, that would enable us to determine whether or not we should make the same distinction. Shall we, without evidence, make the same difference in prescribing interstate fares? To do so would be to abandon the 'possession of the field' and to admit 'divided authority over interstate commerce.' This we may not do under the law fixing our powers and prescribing our duties. *N. Y. C. & H. R. R. Co. v. Hudson Co.*, 227 U. S., 248; *C., R. I. & P. Ry. Co. v. Hardwick Farmers Elevator Co.*, 226 U. S., 426.

"In the *Minnesota Rate Cases, supra*, Mr. Justice Hughes said:

"The power of Congress to regulate commerce among the several states is supreme and plenary. It is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." *Gibbons v. Ogden*, 9 Wheat. 1, 196. The conviction of its necessity sprang from the disastrous experiences under the Confederation, when the states vied in discriminatory measures against each other. In order to end these evils, the grant in the Constitution conferred upon Congress an authority at all times adequate to secure the freedom of interstate commercial intercourse from state control and to provide effective regulation of that intercourse as the national interest may demand."

"Without repeating the facts herebefore stated relating to the contest by the carriers of these intrastate rates, and having in view some adjustments that have been made, and that perhaps others are in contemplation between the carriers and state authorities, it cannot be claimed that these intrastate rates were voluntarily established or accepted by the carriers. From a careful review of the records and having considered the contentions of the respective parties we do not feel justified in condemning the rates complained of as unreasonable.

"There remains the question of discrimination. The claim of discrimination as made at the hearing is based on two facts: First, that an intrastate rate of 2 cents is in force on most railroads in the states of Arkansas, Missouri, and Oklahoma; and, second, that some of the carriers here defendants maintain a 2-cent passenger fare interstate in and through Kansas and Nebraska and other states. The second of these claims is not made by any allegation in the complaint.

"The principle here applicable is that stated in *Baxter & Co. v. G. S. & F. Ry. Co.*, 21 I. C. C., 647, 648, where we said:

"While state rates are valuable for comparative purposes in fixing a reasonable charge for a transportation service, the assumption of complainant that the action of the defendant in this case in maintaining higher transportation rates on interstate than upon intrastate traffic amounts to unlawful discrimination on the part of the carrier is not sound, for upon the record it is shown that the condition is one over which the carrier has no control."

"See also *Trier v. C. P. M. & O. Ry. Co.*, 30 I. C. C. 352.

"Since this case was argued the Supreme Court has announced its decision in the *Shreveport case, H. E. & W. T. Ry. Co. v. United States*, 234 U. S. 342. In this case the court had under consideration an order of this Commission entered in a proceeding in which we had found that the Texas intrastate rates maintained by the carriers serving both Louisiana and Texas were violative of section three of the act to regulate commerce, and which order directed such carriers to cease and desist from charging higher interstate rates from Shreveport, La., into Texas than were contemporaneously exacted for an equal distance between local points in the state of Texas. *Railroad Com. of La. v. St. L. S. W. Ry. Co.*, 23 I. C. C. 31. In determining the question thus presented, Mr. Justice Hughes, speaking for the court said:

"It is for Congress to supply the needed correction where the relation between intrastate and interstate rates present the evil to be corrected, and this it may do completely by reason of its control of the interstate carrier in all its matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control of the effective government of that commerce.

"It is also clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes. \* \* \* There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to intrastate rates as maintained by the carriers. It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach."

"From this decision of the Supreme Court it follows that if that discrimination which is prohibited by law is shown to exist here we have the power to order that the carriers desist therefrom and in removing such unlawful discrimination 'arising from the relation of intrastate to interstate rates' we are 'not bound to reduce the latter below what we find is a proper standard, fair to the carrier and to the public.'"

In *Rates on Beer and Other Malt Products*<sup>8</sup> the Commission said: "Unquestionably the law of Minnesota presents a situation to the carriers which makes it necessary for them either to adjust some interstate rates to the mileage rates prescribed by that law, to leave their intrastate and interstate rates out of line, or to suffer material reductions below the intrastate rates fixed thereunder. While we may consider this fact, 'Congress does not directly or indirectly interfere with local rates by adopting their sum as the interstate rate,' *L. & N. R. R. Co. v. Eubank*, 184 U. S., 27, 42, and we cannot say that merely because a higher intrastate rate exists that an increase of an interstate rate to meet the state-made rate is justified, even though the transporta-

tion conditions as to distance and territory are similar. Nor do the facts here presented require that we consider the application of the decision of the Supreme Court in the *Shreveport case*, *H. E. & W. T. Ry. Co. v. United States*, 234 U. S., 342. This conclusion makes it unnecessary for us to more particularly describe the Minnesota statute and the situation resulting therefrom."

In *Memphis Merchants Exchange v. Illinois C. Rd. Co.*<sup>9</sup> the Commission stated: "It is now well settled by decisions of this Commission and the courts that if rates approved by state authority cause undue discrimination against interstate commerce, it is the duty and within the power of this Commission to require the removal of the discrimination without at the same time requiring the reduction of reasonable interstate rates. *Houston & Texas Ry. v. United States*, 234 U. S. 342; *Railroad Commission of La. v. St. L. S. W. Ry. Co.*, 23 I. C. C. 31; *Colonial Salt Co., v. C. B. & Q. R. R. Co.*, 31 I. C. C. 559. However the mere maintenance of a rate for movement of traffic wholly within a state lower than a rate found reasonable by this Commission for the local state portion of a through interstate movement does not of itself constitute undue discrimination within the meaning of the act. The State Public Utilities Commission of Illinois, acting within the scope of its authority, has the undoubted right to prescribe rates of freight applicable to movements of traffic by railroad wholly within the state of Illinois. In a case which merely calls to our attention the fact that a state rate is lower than an interstate rate on the same traffic from and to the same points, we have no authority or power to condemn the state rate and take action which would be warrant to carriers to increase it to the level of the applicable interstate rate. It is only in cases where the rates prescribed by state authorities necessarily operate to unduly prefer a state over an interstate shipper, or to otherwise interfere with the proper application of rates prescribed by this Commission, that the authority of the Federal law is properly to be exercised."

In *Rates, Fares and Charges of New York Central Rd. Co.*<sup>10</sup> the Commission stated: "This case raises again the question whether in regulating interstate commerce, under authority reposed in us by Congress we have incidentally the power of regulating intrastate commerce so far as it affects interstate commerce. In the *Shreveport case*, 23 I. C. C. 32, we held that we did possess that power by act of Congress, and we pointed out:

"'Congress passed this act with full knowledge and profound appreciation of those decisions of the Supreme Court in which it had been held that state commerce was that wholly within a state "and not affecting interstate commerce," as is fully shown by the Cullom Report of 1886, out of which grew the act to regulate commerce.'

"The position that we took was sustained by the United States Supreme Court, and the principles on which we acted then continues to be our guide. But since then the general obligation resting upon us to exercise control over intrastate commerce so far as its affects interstate commerce has been put in the form of a mandate by section 13 of the Interstate Commerce Act, as amended by the Transportation Act, 1920.'"

For a full discussion of this subject, see "*Power of Commission to prescribe rate, classification, regulation or practice to govern intra-*

*state commerce in order to remove a preference, prejudice, or discrimination against interstate or foreign commerce," Section 613-NN, post.*

1. In Re Freight Rates between Memphis and Arkansas Points (1905), 11 I. C. C. Rep. 180.
2. Railroad Commission of Wisconsin v. Chicago & N. W. Ry. Co. (1909), 16 I. C. C. Rep. 85; Bartles Oil Co. v. Chicago, M. & St. P. Ry. Co. (1909), 17 I. C. C. Rep. 146; Marshall Oil Co. v. Chicago & N. W. Ry. Co. (1908), 14 I. C. C. Rep. 210.
3. Saunders & Co. v. Southern Express Co. (1910), 18 I. C. C. Rep. 415.
4. Corn Belt Meat Producers' Assn. v. Chicago, B. & Q. Ry. Co. (1908), 14 I. C. C. Rep. 376; Willman & Co. v. St. Louis, I. M. & S. Ry. Co. (1912), 22 I. C. C. Rep. 405; Pulp & Paper Mfrs. Traffic Assn. v. Chicago, M. & St. P. Ry. Co. (1913), 27 I. C. C. Rep. 83, 96.
5. Paola Refining Co. v. Missouri, K. & T. Ry. Co. (1909), 15 I. C. C. Rep. 29; Weatherford Chamber of Commerce v. Missouri, K. & T. Ry. Co. (1914), 31 I. C. C. Rep. 655, 667; Kansas Wholesale Grocery Co. v. Ahnapee & W. Ry. Co. (1914), 32 I. C. C. Rep. 139, 145; Freight Rates between Points in Minnesota via Interstate Routes and between Points in Minnesota and Other States (1914), 32 I. C. C. Rep. 361, 363.
6. Hope Cotton Oil Co. v. Texas & P. Ry. Co. (1907), 12 I. C. C. Rep. 266.
7. Corporation Commission of Oklahoma v. Atchison, T. & S. F. Ry. Co. (1914), 31 I. C. C. Rep. 532, 540, et seq.
8. Beer and Other Malt Products between Stations in Iowa and South Dakota and Points in Minnesota and Wisconsin (1914), 31 I. C. C. Rep. 544, 545; Rates on Agricultural Implements and Other Commodities between La Crosse, Wis., and Other Points and St. Paul, Minn., and Other Points (1915), 36 I. C. C. Rep. 151, 153.
9. Memphis Merchants Exchange v. Illinois C. Rd. Co. (1917), 43 I. C. C. Rep. 378, 387.
10. In the Matter of Rates, Fares and Charges of the New York Central Rd. Co. and Other Railroad Companies in the State of New York (1920), 59 I. C. C. Rep. 290, 291.
11. Sec. 13. (3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provisions of this Act.
- (4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

## 611. Advances in freight rates.

### 611-A. METHODS OF ADVANCING RATES.

There are two ways in which an advance in rates may be accomplished; First, by increasing the rate *eo nomine*; second, by changing the classification.<sup>1</sup>

An advance in rates resulting from an increase in minimum weight cannot be condemned merely because it affects a contractive sale based on the lower minimum, in the absence of any evidence that the rate or minimum advanced is unreasonable.<sup>2</sup>

1. Fourteenth Annual Report of Interstate Commerce Commission (1900); National Hay Assn. v. Lake Shore & M. S. Rd. Co. (1902), 9 I. C. C. Rep. 264.
2. Barnum Iron Works v. Cleveland, C. C. & St. L. Ry. Co. (1910), 18 I. C. C. Rep. 94, 95.

#### 611-B. EQUALIZATION OF DISCRIMINATIONS.

An advance in a rate in order to remove a discrimination is justified.<sup>1</sup> However, no justification exists for increasing rates, which have long been established and which are not claimed to be unremunerative, simply to remove a discrimination caused by advancing rates at competitive points.<sup>2</sup>

A new increased rate might eliminate competition and yet be condemned for being unreasonably high. The fact, however, that it does not eliminate competition should be given some weight in determining its propriety.<sup>3</sup>

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1. Lautz Bros. & Co., Inc. v. Lehigh V. Rd. Co. (1909), 17 I. C. C. Rep. 167.
  2. Rates on Bananas from New Orleans, La., Galveston, Tex., and Other Gulf Ports to Topeka, Kans., Lincoln and Beatrice, Nebr. (1914), 20 I. C. C. Rep. 510, 520.
  3. Wickwire Steel Co. v. New York C. & H. R. Rd. Co. (1914), 30 I. C. C. Rep. 415, 421.

#### 611-C. ADVANCE IN RATE TO CORRECT ERRONEOUS PRIOR RATE.

An error in the adjustment of rates is no justification for the proposed increase thereof.<sup>1</sup>

The fact that a previously existing rate was published through error may be considered, however, in passing upon an advance.<sup>2</sup>

By the inadvertent omission in a tariff of the qualifying phrase a rate of 10 cents, intended to apply only on coarse salt in bulk, became applicable on coarse salt in packages; *Held*, That the statutory burden of justifying the increased rate resulting from the subsequent correction of the tariff fully met by the carriers when the circumstances are explained.<sup>3</sup>

In *Wausau Advancement Assn. v. Chicago & N. W. Ry. Co.*<sup>4</sup> the Commission stated: "This claim of mistake in the publication of rates which remained in effect for as long a period as two years is not persuasive. The Commission in such cases will regard the rate as one voluntarily and knowingly made. It recognizes that errors will creep into tariffs but feels that they should be discovered and eliminated within a reasonable time."

The Commission has approved an advance where the tariff containing the advance simply corrected the inadvertent act of one of the carriers.<sup>5</sup>

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1. Wheat Rates from Oklahoma Points to Memphis, Tenn., and Other Points (1914). 30 I. C. C. Rep. 93, 95.
  2. Chamber of Commerce, Houston, Tex. v. International & G. N. Ry. Co. (1914). 32 I. C. C. Rep. 247.
  3. Gottron Bros. Co. v. Genesee & W. Rd. Co. (1913), 28 I. C. C. Rep. 38.
  4. Wausau Advancement Assn. v. Chicago & N. W. Ry. Co. (1913), 28 I. C. C. Rep. 459, 460.
  5. In the Matter of the Investigation and Suspension of Advances in Class Rates by Carriers Operating between Certain Points in Iowa and Minneapolis, Minn., and Other Points (1912), 25 I. C. C. Rep. 268, 271.

**611-D. MAINTENANCE OF HIGHER INTRASTATE RATE THAN INTERSTATE RATE.**

It cannot be said that merely because a higher intrastate rate exists that an increase of an interstate rate to meet the state-made rate is justified, even though the transportation conditions as to distance and territory are the same.<sup>1</sup>

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1. Beer and Other Malt Products between Stations in Iowa and South Dakota and Points in Minnesota and Wisconsin (1914), 31 I. C. C. Rep. 544.

**611-E. INCREASE IN INTERSTATE RATES TO REMOVE ANY UNDUE OR UNREASONABLE ADVANTAGE, PREFERENCE, PREJUDICE OR DISCRIMINATION AGAINST INTERSTATE OR FOREIGN COMMERCE.**

See "*Power of Commission to prescribe rate, classification, regulation, or practice to govern intrastate traffic in order to remove a preference or prejudice, or discrimination against interstate or foreign commerce,*" Section 613-NN, post.

**611-F. PRESUMPTION WHERE LONG-ESTABLISHED RATE IS ADVANCED FOR A SHORT PERIOD AND THEN REDUCED TO ITS FORMER BASIS.**

See "*Presumption where long-established rate is advanced for a short period and then reduced to the former basis, Section 609-HHH, ante.*

**611-G. ADVANCE IN RATES TO PRESERVE PROPER RELATION BETWEEN COMMODITIES**

A carrier may be justified in advancing rates in order to bring those rates into a proper relationship.<sup>1</sup> The Commission has repeatedly sanctioned increases of rates for the purpose of bringing such rates into harmony with the established rate structure.<sup>2</sup>

A disparity between two rates can as logically be corrected by lowering the higher rate as by increasing the lower rate. In the absence of proof that the higher rate is reasonable a carrier which advances the rate to the level of another rate does not sustain the burden of proof imposed by the statute merely by pointing out that the object of the increase was to remove the disparity.

There are cases where increased rates may be proper to secure uniformity in rate relationship, but it is to be remembered that uniformity may be secured in many cases by reduced rates as well as by increased rates. The mere fact that a relation of rates requires readjustment in the interest of uniformity is no proof that the rates increased to the level of relatively higher rates are reasonable.<sup>3</sup>

No justification exists for increasing rates which have long been established and which are not claimed to be unremunerative, simply to remove a discrimination caused by advancing rates at competing points.<sup>4</sup>

An increased rate on raw material of itself argues for a higher rate on the finished product.<sup>5</sup>

In *Rates on Common Brick to Canada*,<sup>6</sup> the Commission stated: "Practically the sole justification for the advance is that a realignment of brick rates from the United States to Canada was necessitated by the decision of the Commission in the *Stowe-Fuller case*, 12 I. C. C. 215, where, it is contended, the Commission held that 'a brick is a brick' and that the same rate must be applied alike to common, building, paving, and fire brick. At that time varying rates applied from Pennsylvania and Ohio. After conferences between the American and the Canadian roads a readjustment was agreed upon which gave to all brick the same rates and at the same time enabled Ohio and Pennsylvania shippers to reach Canada substantially on a parity. In accomplishing this realignment both advances and reductions were made, the advances applying principally to common and paving brick and the reductions to fire and other high-grade brick, the idea being to conform to the Chicago-New York scale which, from 25 cents on fire brick, 22½ cents on building brick, and 20 cents on paving brick, was fixed by the Commission at 21 cents on all brick. *Metropolitan Paving Brick case*, 17 I. C. C. 197. But Orchard Park and Jewettville manufacture nothing but common brick, and no rates were published on fire or paving brick. Consequently there were no varying rates to equalize, and no advance in the rates on common brick from these points can be justified on that ground."

In *Davis Sewing Machine Co. v. Pittsburgh C. C. & St. L. Ry. Co.*<sup>7</sup> the Commission stated: "Comparisons are submitted with rates on automobiles, motorcycles, buggies and other vehicles. Motorcycles, which are of a similar character, carry the same rating as bicycles. The ratings on vehicles generally were advanced at the same time bicycles were advanced.

"It is asserted that a restoration of the second-class rate on bicycles from Dayton to Chicago would affect the entire official classification and necessitate similar changes between all points in that territory where bicycles move in carloads. The fact that higher prices now prevail than formerly in the bicycle trade is also relied upon in justification of the higher rate.

"We have very carefully considered all the evidence submitted at both hearings, and it is our finding and conclusion that the carriers have now shown the advanced rate to be just and reasonable. The complaint will be dismissed."

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1. In the Matter of the Investigation and Suspension of Advances in Rates by Carriers for the Transportation of Lumber and Articles taking Lumber Rates from Stations on the Alabama Great Southern Railroad and Other Points to St. Louis, Mo., and Other Points (1912), 24 I. C. C. Rep. 686.
  2. Westbound Lake-and-Rail Knit Goods Commodity Rates (1914), 32 I. C. C. Rep. 54, 57.
  3. Rates on Lumber from Anoka, Minn., and Other Points, to Stations in South and North Dakota (1915), 32 I. C. C. Rep. 494, 496.
  4. Rates on Bananas from New Orleans, La., Galveston, Tex., and Other Gulf Ports to Topeka, Kans., Lincoln and Beatrice, Nebr. (1914), 30 I. C. C. Rep. 510, 520.
  5. Rates on Linseed Oil (1914), 26 I. C. C. Rep. 265, 270.
  6. Rates on Common Brick to Canada (1913), 26 I. C. C. Rep. 129, 130
  7. *Davis Sewing Machine Co. v. Pittsburgh, C. C. & St. L. Ry. Co.* (1913), 26 I. C. C. Rep. 282.

**611-H. CANCELLATION OF COMMODITY RATES BECAUSE OF LACK OF MOVEMENT OF TRAFFIC.**

In *Sandstone, Minn.—Missouri River Building Stone Rates*,<sup>1</sup> the Commission stated: "Respondent Great Northern Railway Company takes the position that the clause in reference to the establishment of rates from and to intermediate points does not place upon the carriers the obligation of establishing the same or a lower rate from intermediate points, but is simply the permission of the Commission to establish such rates under authority of the Commission on one day's notice to the public and to the Commission. It, therefore, declined to submit any testimony as to the reasonableness of the class rates from Sandstone and St. Paul to Kansas City, which are 19 to 17 cents per 100 pounds, respectively, on the ground that as to the Sandstone rate the fact that there is not and has not been for a considerable period any movement thereunder is sufficient justification for the cancellation of the commodity rate, and as to the St. Paul rate, because it is not interested in traffic from St. Paul to Kansas City. The Great Northern feels that unless protestants can demonstrate an interest in the rates from Sandstone and Banning and desire the establishment of a 12-cent or lower rate from St. Paul to Kansas City, that issue must be brought to the attention of the Commission in an appropriate proceeding, complaining of the unreasonableness of the 17-cent class-E rate from St. Paul to Kansas City. It contends that protestants, located as they are at St. Paul, have no interest in the rates on building stone from Banning and Sandstone, and that the reasonableness of the rate from St. Paul to Kansas City is not in issue in this proceeding. The distance tariff rate of the Chicago Great Western from St. Paul to Kansas City is 16 cents.

"The position taken by the Great Northern is not tenable. Rule 77 of the Commission's Tariff Circular 18-A was adopted solely as a feasible and economical plan under which commodity rates might be published from known points of production or to known points of consumption without also publishing commodity rates from or to all intermediate points, which perhaps, or even probably, would never forward or receive shipments of that commodity. The carrier that adopts this means of relief from the long-and-short-haul provision of the act is, however, required to provide in its tariff, as did these respondents in this instance, that upon reasonable request therefor rates will be established on short notice from or to any intermediate point which will not be higher than those to the next more distant point. It constitutes the consent of the Commission to the use of the rule and to the establishment of rates on short notice thereunder and in accordance therewith, but it requires that the carrier shall incorporate in its tariff the provision that upon the proper request it will establish rates from the intermediate point in accord with the rule and the tariff provision. Manifestly a carrier may not employ this rule for the purpose of giving a rate to a point which it desires to accommodate or favor and then when it is called upon to accord to intermediate points the rates to which, under the law, they are entitled, escape its obligation by simply cancelling the arrangement. The use of this rule and plan for publishing commodity rates does not deprive the intermediate points of any of their lawful rights and its incorporation in a tariff is a recognition of the rights of the intermediate points under the long-

and-short-haul rule and a published guaranty that those rights will be recognized and protected upon demand. That guaranty must be observed in full and in good faith.

"It is true that the Great Northern is not particularly interested in the rates from St. Paul to Kansas City, but here we have a joint tariff issued by the joint agent of respondents in which they provide the rate from Sandstone and Banning to Kansas City and agree to establish upon request therefor a rate from any intermediate point that shall not be higher. They are requested to establish the same rate from the less-distant intermediate point, St. Paul, and reply that rather than to live up to the assurances given by them in their tariff they will cancel same.

"The cancellation of the commodity rates has the effect of leaving higher rates the only ones applicable. It is therefore an instance of increased rates in which the burden is upon respondents to prove the reasonableness of the increased rates. This they have not undertaken to do, except by showing that traffic did not move under the lower rates. They allege that building stone was included under the commodity rates through error. This allegation does not impress us strongly in face of the fact that the rates have been in effect for more than five years."

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1. Sandstone—Missouri River Building Stone Rates (1913), 28 I. C. C. Rep. 268, 270, et seq.

#### 611-I. CARRIERS ADVANCING CERTAIN RATES TO AVOID REDUCING OTHER RATES.

The fact that unless the rates to several communities are increased, another and a competing community will be entitled to a lower rate than it now enjoys is no justification for the increases.<sup>1</sup>

Where existing rates were an exception resulting in violations of sections 3 and 4 of the Act, and the making of other reductions would bring about further departures, the advances were held justified.<sup>2</sup>

In *Wickwire Steel Co. v. New York C. & H. R. Rd. Co.*<sup>3</sup> the Commission stated: "Surely it is always open to the Commission to consider as a part of the test of the propriety of the new rate the circumstance that it will eliminate a discrimination existing under the adjustment which it is to supersede. This is not to say that the consideration as to whether the new rate affects or eliminates a discrimination can be urged in sole justification of the rate. A new increased rate might eliminate discrimination and yet be condemned for being unreasonably high. The fact, however, that it does eliminate discrimination should be given some weight in determining its propriety."

In *Lumber Rates to Knoxville, Tenn.*<sup>4</sup> the Commission said: "If it be a fact, as the record indicates, that the refusal of the Commission to prove the proposed increase of rates from Decatur and Sheffield to Knoxville make it necessary for the respondents to reduce the rates on lumber from certain intermediate points in Knoxville in order to remove violations of the fourth section, that fact does not justify the proposed increase."

The mere fact that carriers may have to reduce the intermediate rates if they do not increase the terminal rates cannot justify an increase.<sup>5</sup>

1. In the Matter of the Investigation and Suspension of Advances in Rates by Carriers for the Transportation of Certain Commodities between Certain Stations located in Texas Common-Point Territory and St. Louis, Mo., and Other Points (1913), 26 I. C. C. Rep. 528, 532.
2. Rates on Knitting-Factory products (1913), 25 I. C. C. Rep. 634, 639.
3. Wickwire Steel Co. v. New York C. & H. R. Rd. Co. (1914), 30 I. C. C. Rep. 415, 420.
4. Lumber Rates to Knoxville, Tenn. (1914), 30 I. C. C. Rep. 524, 526.
5. Cement Rates between Points in Illinois and Points in Minnesota and Other States (1914), 32 I. C. C. Rep. 369, 372.

#### 611-J. DISPUTES BETWEEN CARRIERS AS TO DIVISIONS DO NOT JUSTIFY INCREASES OF RATES

Disagreement between carriers over divisions will not be recognized as a justification for the withdrawal of joint rates or through rates. Especially is this true if such withdrawal occasions higher charges to shippers or receivers, and deprives them of the opportunity to ship via reasonable through routes.<sup>1</sup>

In *Rates on Lumber and Other Forest Products from Points in Arkansas and Other States to Points in Iowa, Minnesota, and Other States*,<sup>2</sup> the Commission said: "The increase having been promulgated by the St. Louis Southwestern upon its own initiative, no attempt was made by the northern lines to sustain the reasonableness of the suspended rates, nor was any effort made by the St. Louis Southwestern to do so. The testimony was confined entirely to the question of divisions. It has been frequently held by this Commission that disputes between carriers as to divisions do not justify increases of rates. The respondents having failed to sustain the burden of showing increased rates to be just and reasonable, the tariff in question should be canceled.

"As heretofore shown, the primary purpose of the tariff was not to secure for the carriers increased rates, but its avowed object was to bring to the consideration of the Commission a controversy between the parties thereto as to divisions. Section 15 of the act to regulate commerce provides:

"Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof, the Commission may, after hearing, make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order. \* \* \*

"The Commission may also, after hearing, on a complaint, or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged, and may prescribe the divisions of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates.

"The provision of the act governing the suspension of new schedules gives to the Commission authority to make such order in reference to a rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice became effective."

1. Lumber Rates from Mississippi to Eastern Points (1913), 27 I. C. C. Rep. 6, 9; Advances on Ground Iron Ore from Points in Alabama, Georgia, and Tennessee to Boston, New York, Philadelphia, and Other Points (1913), 26 I. C. C. Rep. 675, 676;

New Mexico Coal Rates (1913), 28 I. C. C. Rep. 328; Rates on Lumber and Other Forest Products from Points in Arkansas and Other States to Points in Iowa, Minnesota, and Other States (1914), 30 I. C. C. Rep. 371, 372.

2. Rates on Lumber and Other Forest Products from Points in Arkansas and Other States to Points in Iowa, Minnesota and Other States (1914), 30 I. C. C. Rep. 371, 372, et seq.

#### 611-K. CARRIERS ARE NOT ESTOPPED FROM ADVANCING RATES BECAUSE OF A RESULTING INJURY TO SHIPPERS

That contracts have been entered into on the basis of a lower rate does not of itself preclude the increasing of such rate.<sup>1</sup> It is doubtful whether evidence of this nature is admissible.<sup>2</sup>

While it may be shown that the protestant's business has decreased since the increase of a certain freight rate and that such increase in rate may make it more difficult for the protestant to compete in a given territory, these facts form no basis for requiring a carrier to establish or maintain a given rate unless it should be found upon all the facts appearing that such a rate is reasonable.<sup>3</sup>

Shippers have no vested interest in the maintenance of existing rates by reason of investments made under those rates which precludes increasing rates that are reasonably low.<sup>4</sup>

That advances made in shipping rates on certain classes of goods would be severely felt by certain shippers is not a sufficient reason for holding that they were not properly made, as any change in market conditions which affected the cost of handling would necessarily be felt.<sup>5</sup>

See "*No estoppel operates against the right of a carrier to enjoy just and reasonable rates,*" Section 609-KKK, ante.

1. Rates on Crushed Stone from McCook and Thornton, Ill. to Stations in Indiana and Michigan (1914), 29 I. C. C. Rep. 136, 137.
2. Duluth, Minn., Log Rates (1914), 29 I. C. C. Rep. 420, 421.
3. Standard Vitrified Brick Co. v. Chicago, B. & Q. Rd. Co. (1914), 32 I. C. C. Rep. 208, 211.
4. Crawford & Bunce v. Pittsburgh, C. C. & St. L. Ry. Co. (1914), 32 I. C. C. Rep. 12, 14.
5. Louisville & N. Rd. Co. v. Interstate Commerce Commission (1912), 195 Fed. Rep. 541.

#### 611-L. INCREASE IN RATES RESULTING IN INCREASE IN DISCRIMINATION.

In *Grain Rates in Central Freight Association Territory*<sup>1</sup>, the Commission said: "Where an increase in rates may operate to create or to increase a discrimination it is always necessary to inquire in passing upon the propriety of the increase whether the discrimination be due, but in instances like the present, where the relation has not been changed and where the discrimination, if one previously existed, has not been intensified, that question does not properly arise upon the justification of the increase. The party claiming to rest under such discrimination should file his complaint in due form, thereby bringing to the attention of interested carriers and other parties the exact matter for consideration."

1. *Grain Rates in Central Freight Association Territory* (1913), 28 I. C. C. Rep. 549, 557.

#### 611-M. RIGHT OF A CARRIER TO ADVANCE ITS RATES.

See "*Right of the carrier to change its rates,*" Section 604-A, *ante*, and, "*No estoppel operates against the right of a carrier to enjoy just and reasonable rates,*" Section 609-KKK, *ante*.

#### 611-N. NO PRESUMPTION OF WRONG ARISES FROM AN ADVANCE IN RATES.

The reasonableness of a rate must of necessity depend upon the conditions surrounding the traffic at the time it moves. The length of the haul, the competition to be met, the cost of the service, the value of the service, the density or volume of tonnage, as well as the general transportation conditions then existing, are factors that have a more or less definite relation to the rate that a carrier may reasonably demand for a transportation service. And these factors, except possibly the length of the haul, the grades, and other transportation conditions, are in their nature neither permanent or fixed, but necessarily change with the general economic panorama. No presumption of law, therefore, can arise against an advanced rate simply because a lower rate previously existed.<sup>1</sup>

The mere fact that a rate has been raised by a carrier carries with it no presumption that it was not rightfully done.<sup>2</sup>

See "*No presumption of wrong arises from a change in rates by the carrier,*" Section 604-B, *ante*, and "*Burden of proof as to reasonableness of increased rates upon a common carrier,*" Section 611-P, *post*.

1. *Memphis Cotton Oil Co. v. Illinois C. Rd. Co.* (1909), 17 I. C. C. Rep. 313, 318.

2. *Interstate Commerce Commission v. Chicago G. W. Rd. Co.* (1908), 209 U. S. 108, 52 L. Ed. 705, 28 Sup. Ct. Rep. 493; *Louisville & N. Rd. Co. v. Interstate Commerce Commission* (1912), 195 Fed. Rep. 541.

#### 611-O. INVESTIGATION AND SUSPENSION OF NEW RATE, CHARGE, REGULATION OR PRACTICE.

See "*Jurisdiction of Interstate Commerce Commission over freight rates and charges,*" Section 614, *post*.

#### 611-P. BURDEN OF PROOF AS TO REASONABleness OF INCREASED RATES UPON COMMON CARRIER.

Section 15, (7) of the Interstate Commerce Act, (*as amended June 18, 1910*) provides as follows:

At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

In *Advance in Rates—Western Case*<sup>1</sup> the Commission made the following observation: "Stress is further laid upon the use of the words '*the burden of proof* shall be upon the common carrier,' and we are urged to a strict interpretation of this language along lines of judicial reasoning in civil and criminal cases. This language has a

common-sense meaning which does not need elucidation by citation of authority.

"It must be borne in mind that this Commission is not a court of law; its function is to apply the mandatory and restrictive provisions of the act to regulate commerce to stated conditions of fact. We must regard the problems presented to us from as many standpoints as there are public interests involved. The making of a rate is in ultimate analysis the exercise of a taxing power on commerce, 73 Fed., 409. The reasonableness of a rate is to be determined by no mere mathematical calculation, though figures of cost and revenue must play a not inconsiderable part in arriving at a final judgment. Wise men may differ as to what a 'just and reasonable rate' is under given conditions. The courts recognize that there is abundant play for what the present Chief Justice so admirably described as 'the flexible limit of judgment which belongs to the power to make rates.' 206 U. S. 26. The unrestricted power to make rates, however, should not rest in the hands of those whose tendency must be, by reason of human nature to exact to the limit the highest return that can be procured. Reasons of public policy demand that there shall be a check placed upon a power which may be perverted and thus brought to restrict and embarrass commerce rather than increase and develop it. Every rate question, therefore, is a public question—this is the underlying principle of the act to regulate commerce and of all similar legislation controlling public utilities. An examination into the specific provisions of the act, especially into those of section 13, will make clear to the candid mind that a complaint before this Commission was not intended to be regarded in the same strict and hard light as a complaint in an action at law, but was to be regarded as an appeal to the Government against oppressive, unjust and illegal action. A shipper may not dismiss his complaint without consent. The fact that he has no interest in the traffic concerned in his complaint does not 'put him out of court.' These and similar provisions indicate that the purpose of Congress in enacting the act to regulate commerce was to establish a body whose function it should be to protect the public interest and not merely regard the technical rights of an individual shipper, and in this view of the law the act has been administered by the Commission. In accepting this theory, therefore, it is not within belief that Congress intended by the language now under consideration to convert this Commission into a tribunal which should merely determine as between two sides the preponderance of evidence and base its decisions upon technical and somewhat archaic rules of evidence.

"By this, however, we are not to be understood as meaning that the language of the act is without significance, or has no binding authority upon us, or that it casts no burden upon the carriers. The assumption of the law is that the railroad which increases its rates takes such action knowing that the law casts upon it—if challenge is made either by this Commission or otherwise—the burden of justifying its action. Theirs, in the language of the learned Dean Wigmore, is 'the risk of nonpersuasion.' *Wigmore on Evidence*, Sec. 2485. The railroad must assume to prove to this Commission that the new and the increased rates are within the words of description and limitation used in the act; that is, that they are just and reasonable. And to say that they must prove this is to say that they must satisfy our minds of this fact."

In *Rates to the Chicago Switching District*<sup>2</sup> the Commission stated: "For each rate, a carrier offers and obligates itself to perform a certain amount of service. If the service so offered and for a long time performed in consideration of that rate includes taking the property transported from a given point and delivering it at a given point, the delivery at that point is in no sense a 'free service.' The carrier may increase the rate or it may curtail the service performed for that rate, but if such action is challenged it must bear the burden of showing that the new rate or service is reasonable and free from unjust discrimination."

A carrier is entitled to reasonable compensation for switching or other services, but is not justified in attempting to restrict traffic to its own lines by making an excessive charge for switching to or from its connections. In a proceeding to determine the propriety of switching charges absorbed by carriers, the Commission must consider them as though they were to be charged for by the railroad rendering the service and paid for by shippers.<sup>3</sup>

1. Western Advance Rate Case: In Re Investigation of Advances in Rates by Carriers in Western Trunk Line, Trans-Missouri, and Illinois Freight Committee Territories (1911), 20 I. C. C. Rep. 307, 314.
2. Rates to or from Certain Points in the Chicago Switching District (1915), 34 I. C. C. Rep. 284, 242. Cited in, *Consolidation Coal Co. v. Chesapeake & O. Ry. Co.* (1921), 60 I. C. C. Rep. 763, 767.
3. Interchange Switching at Wichita, Kansas. (1921), 61 I. C. C. Rep. 205, 206, citing, *Switching Absorptions* (1917), 47 I. C. C. Rep. 583.

**611-Q: AFTER EXPIRATION OF COMMISSION'S ORDER SUSPENDING TARIFF CONTAINING NEW RATES, CHARGES, REGULATIONS OR PRACTICES, THE PROPOSED RATES CONTAINED THEREIN DO NOT AUTOMATICALLY GO INTO EFFECT.**

In *Stonega Coke & Coal Co. v. Louisville & N. Rd. Co.*<sup>1</sup> the Commission stated: "This case was originally decided January 7, 1913, 26 I. C. C., 20. It was reopened November 9, 1914, on motion of respondent, the Louisville & Nashville, and the rehearing was begun February 23, 1915. In the meantime, on January 7, 1915, the two-year period for which the original order was to run expired. At the rehearing it was urged for respondent that since the order had expired there was nothing in the case to reconsider. Counsel contended that section 16a, giving the Commission power to reopen and reconsider its cases, contemplated a rehearing and reconsideration before the expiration of the order in the particular case. The section provides:

"That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein \* \* \*. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. \* \* \* Any decision, order, or requirement made after such rehearing reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order.

"From this it is plain that the Commission may grant a rehearing in a case in which no order is made, there being only a 'decision.' In such a case no time limit upon a hearing could be contemplated. No provision is made for any different treatment of a rehearing on a 'decision' and a rehearing of a case where an order is made, and no distinction can be drawn under this language. This

being true it cannot be said that this section contemplates necessarily that the rehearing and reconsideration of a case in which an order is made must be completed before that order expires.

"Again, under this section, an application for a rehearing may be made 'at any time.' A case in which an order is made might therefore be reopened, and reheard after the effective period of the order has expired. Incidentally, the Commission may, on a rehearing, make just such an order giving effect to its views on rehearing as it may make on an original hearing. This must be held to confer upon the Commission the power to fix the period during which its supplemental order shall be effective as well as conferring the power to draft supplemental orders in other particulars.

"This case was reopened on respondent's motion and it cannot be heard to complain of something it initiated and requested, but had this not been so, the course of this procedure works no hardship upon the respondent. The original hearing involved increases in rates which it was found had not been justified and the existing rates were ordered to be kept in effect for a two-year period. At the expiration of such period the formerly proposed increases do not go into effect automatically. To obtain the benefit of the increases the rates must be lawfully published by filing tariffs in the prescribed manner. Rates so published would then be subject to suspension and investigation again, and this is what has happened in this case. The respondent filed tariffs substantially republishing the rates formerly carried in the tariffs originally suspended and these tariffs were protested and suspended in Investigation and Suspension Dockets Nos. 625 and 633, which cases have been consolidated herewith."

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1. *Stonega Coke & Coal Co. v. Louisville & N. Rd. Co.* (1916), 39 I. C. C. Rep. 523, 535.

#### 611-R. MAINTENANCE OF PORT DIFFERENTIALS ON INCREASED RATES.

In *Increased Rates, 1920*, the Commission stated: "The Eastern carriers express of record their willingness to preserve existing relationships between the rates to and from eastern ports. No objection to this proposal was made. This result can be readily accomplished for the reason that all rates in official classification territory between the ports and points west of the Buffalo-Pittsburgh line are based on the New York-Chicago rates. The base rates may be increased and existing port differentials maintained. It is our view that in filing the increased rates here authorized a provision of this character should be made."

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1. *In the Matter of the Applications of Carriers in Official, Southern, and Western Classification Territories for Authority to Increase Rates (Ex Parte 74)* (1920), 58 I. C. C. Rep. 220, 253.

#### 611-S. INCREASED RATES OF BOAT LINES.

In *Increased Rates, 1920* the Commission stated: "There have been in this proceeding applications for increased rates by a number of boat lines. The record shows that the expenses of boat lines have increased in general at least in the same proportion as expenses of the railroads. Authority is therefore granted to boat lines subject

to our jurisdiction to increase their rates to the same extent as increases are herein granted to railroads operating between the same points or in the same territory. In the construction of rail-and-lake rates the present parity between Chicago and Duluth should be maintained."

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1. In the Matter of the Applications of Carriers in Official, Southern, and Western Classification Territories for Authority to Increase Rates (Ex Parte 74) (1920), 58 I. C. C. Rep. 220, 253.

#### 611-T. INCREASED FREIGHT RATES OF ELECTRIC LINES.

In *Increased Rates, 1920*<sup>1</sup> the Commission stated: "Petitions have been filed in this proceeding by a national organization of electric lines, seeking permission to increase their rates in the same proportion as the rates of trunk lines are advanced. The operating costs of these lines have, on the whole, increased in approximately the same ratio as those of steam railroads. In some instances there is competition between the electric lines and the steam railroads. We conclude that freight rates of electric lines may be increased by the same percentages as are approved herein for trunk lines in the same territory. This is not to be construed as an expression of disapproval of increases, made or proposed in the regular manner, in the passenger fares of electric lines."

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1. In the Matter of the Applications of Carriers in Official, Southern, and Western Classification Territories for Authority to Increase Rates (Ex Parte 74) (1920), 58 I. C. C. Rep. 220, 253.

#### 611-U. INCREASE IN MINIMUM CARLOAD CHARGE, MINIMUM CLASS SCALE, AND MINIMUM CHARGE PER SHIPMENT.

In *Increased Rates, 1920*,<sup>1</sup> the Commission stated: "There is now in effect, with certain important exceptions, a minimum charge of \$15.00 per car on carload traffic, applicable to line-haul movements. There are also minimum class rates in the three classification territories. We find on the record no explanation of the underlying basis of the minimum carload charge or the minimum class scales and no justification for increasing them. It is our understanding that these minima were imposed as a revenue measure in connection with rates substantially lower than those authorized in this report. We also find that the minimum charge per shipment for less-than-carload traffic should not be increased."

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1. In the Matter of the Applications of Carriers in Official, Southern, and Western Classification Territories for Authority to Increase Rates (Ex Parte 74) (1920), 58 I. C. C. Rep. 220, 254.

#### 611-V. INCREASES IN JOINT RATES TO AND FROM FOREIGN COUNTRIES.

In *Increased Rates, 1920*<sup>1</sup>, the Commission stated: "Nothing herein should be construed as authorizing any increases in the proportions of joint through rates to or from points in foreign countries *accruing in such foreign countries*. The proportions of such rates *accruing within the United States* may, however, be increased to the extent herein approved for domestic rates in the same territory."

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1. In the Matter of the Applications of Carriers in Official, Southern, and Western Classification Territories for Authority to Increase Rates (Ex Parte 74) (1920), 58 I. C. C. Rep. 220, 254.

**611-W. EFFECTIVE DATE OF NEW RATES AND SUBSEQUENT ADJUSTMENTS UNDER INCREASED RATES, 1920, COVERED BY EX PARTE 74.**

See "*Effective date of new rates and subsequent adjustments under Increased Rates, 1920, covered by Ex Parte 74,*" Section 603-H, *ante*.

**611-X. INCREASES IN CHARGES FOR SPECIAL SERVICES.**

In *Increased Rates, 1920*,<sup>1</sup> the Commission stated: "The carriers' original petitions asked for percentage increases in freight revenue only. In their report to us, revenue for switching and certain other special services is stated separately from freight revenue, and therefore, accepted literally, the proposal would result in no increases on switching service. However, it is conceded that the submission of the proposal in this form was due to a misunderstanding, and it is now proposed to apply increases to switching and other special services as well as to freight rates proper."

"No substantial reasons have been developed for exempting charges for switching from the general increases. It is our opinion that the charges for this service should be increased, together with the charges for transit, weighing, diversion, reconsignment, lighterage, floatage, storage (not including track storage), and transfer, where the carriers provide separate charges against shippers for such service. The charges for other special services are not to be subject to the general increases herein authorized. The percentage to apply should be determined by the percentage applicable in the boundary line between two groups taking different percentages the higher percentage should apply."

"It should be understood that where tariffs now provide for the absorption by one carrier of the charges of another carrier in specific amounts such absorptions should be revised in harmony with the increases in charges being authorized."

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1. In the Matter of the Applications of Carriers in Official, Southern, and Western Classification Territories for Authority to Increase Rates (Ex Parte 74) (1920), 58 I. C. C. Rep. 220, 242, et seq.

**611-Y. GENERAL INCREASES IN FREIGHT RATES.**

The following is the opinion and conclusion of the Interstate Commerce Commission with reference to general increases in freight rates considered in Ex Parte 74:<sup>1</sup> "In their original applications the carriers proposed general percentage increases in freight rates in the respective groups as follows: eastern, 30 per cent; southern 31 per cent; western, 24 per cent.

"Following such general percentage increases, they indicate their willingness, where necessary, to revise rates to restore in so far as is deemed practicable existing recognized relationships and differentials, and as to coal and grain in certain important situations such readjustments are proposed in this proceeding. It is stated that the percentage method is not only on the whole the fairest to all interests by distributing the burden in proportion to the haul, but that it is the only way in which the desired increased revenue may be obtained without compli-

cations and delays due to tariff difficulties and to the lack of accurate statistics from which to determine the amount of revenue which may reasonably be expected from flat or maximum increases on particular commodities.

"It would be desirable, if it were possible, to determine definitely the commodities, the sections of the country, and even the individual rates which can best bear the burden of increases, and the relationships of the rates and differentials which will be disturbed by a percentage increase. This is precluded by the necessity of prompt action upon the main issues presented.

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"We are of the opinion and find that the following percentage increases in the charges for freight service, including switching and special services, together with the other increases hereinbefore approved, would under present conditions result in rates not unreasonable in the aggregate under section 1 of the act and would enable the carriers in the respective groups, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures and equipment, to earn an aggregate annual railway operating income equal, as nearly as may be, to a return of  $5\frac{1}{2}$  per cent upon the aggregate value, for the purposes of this proceeding, of the railway property of such carriers held for and used in the service of transportation and  $\frac{1}{2}$  of 1 per cent in addition; eastern group, 40 per cent; southern group, 25 per cent; western group, 35 per cent; Mountain-Pacific group, 25 per cent.

"In view of the different percentages of increase herein approved, it becomes necessary to make provision for rates between the various groups.

"(1) Where rates are constructed by the use of combinations upon gateways between any two groups, the through rates should be increased by applying to each factor its respective percentage.

"(2) Rates between points within a group and points on the border line of such group should be increased according to the percentage applicable to the group. Where a river constitutes a boundary line between two groups, points on both banks thereof shall be considered as border-line points.

"(3) Joint or single-line through rates between points in one group and points in other groups should be increased 33 1-3 per cent.

"(4) In cases where the rates over different routes between the same points would, by a strict application of the varying percentages of increase herein approved, be subject to different percentages, the lowest percentage applicable to any of the routes may be applied in the rates over all of such routes.

"In the construction of rates in accordance with these findings it is not intended that the group boundaries hereinbefore designated should be strictly observed, but the territorial boundaries heretofore recognized should be observed. For example, Richmond, one of the so-called Virginia cities, should continue on the basis which it has heretofore enjoyed.

"The above findings apply to all steam railroads subject to our jurisdiction, including so-called 'short lines,' but to railroads in Alaska.

"While the New England carriers are included in the eastern group and are subject to the percentage for that group, the evidence as to the disproportionate needs of the New England lines makes it desirable that the carriers give careful consideration to the divisions of joint rates accruing to these lines."

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1. *Ex Parte 74: In the Matter of the Applications of Carriers in Official, Southern, and Western Classification Territories for Authority to Increase Rates* (1920), 58 I. C. C. Rep. 220, 243, 246, 247.

#### 611-Z. PERCENTAGE INCREASES VERSUS FLAT INCREASES AND MAINTENANCE OF DIFFERENTIALS AND RELATIONSHIPS.

In *Increased Rates, 1920*, the Commission stated: "Many shippers have directed their testimony and arguments principally to the method of increasing the rates rather than to the amount of the increases. Shippers are far from unanimous in their views and may be divided into three groups: (a) those who seek the preservation of existing relationships and differentials either by specific or flat increases or by applying the percentage increase to base rates and employing in connection therewith differentials from and to other points; (b) those who advocate a percentage advance in all instances, contending that differentials should increase in the same ratio as all other rates and charges and (c) those who advocate a percentage increase with a maximum.

"While established or 'differential' relationships of rates are not general, there are many such adjustments; some fixed by the carriers and others by us, and it is contended by some shippers that in such cases it is desirable in readjusting the rates to maintain the differentials.

"Many relationships in cents per unit were disturbed by the increases made by the Director General, except upon a few commodities of heavy movement which were subjected to specific increases in cents or dollars and cents per unit. A relatively small proportion of these relationships have subsequently been restored.

"It is evident that there are many competitive situations where no recognized differentials have ever existed but where nevertheless, the rates have been made to reflect competitive conditions. Such situations greatly outnumber those where 'fixed relationships' have been established.

"It is generally understood that on traffic to and from western trunk line territory and the southwest, Chicago enjoyed for years a 'differential' of 20 cents, first class, over St. Louis. This was thought to be a fixed, recognized, long-standing difference, and well entitled to bear the title 'differential.' Under General Order No. 28 it was increased to 25 cents. We are now asked on behalf of certain Chicago interests not to increase this differential. In this connection it is interesting to note that on traffic to and from the east the St. Louis rates

are made uniformly 117 per cent of the Chicago rates, so that under any general increase in rates the spread between the St. Louis rates and the Chicago rates is automatically widened. In 1914 the first-class rate from New York to St. Louis was 13 cents higher than to Chicago. The difference is now 19 cents, although the percentage relationship is the same now as it was in 1914. There is apparently no more justification for maintaining Chicago's differential over St. Louis on traffic to the west than for maintaining the differential of St. Louis over Chicago on traffic from the east. Practically all rates in official classification territory are constructed upon a percentage basis, and attention is directed to the important fact that not a single interest has here maintained, with the possible exception of Chicago, that we should depart generally from the percentage basis which has so long prevailed.

"In favor of maintaining differentials, it is said that they have been fixed in most cases after careful investigation, and that they represent the proper measure of differences in the rates; that often they represent the maximum differences which will permit more distant shippers to compete with those in close proximity; that to increase rates by a percentage tends to decrease the radius in which goods are marketed, and thus by lessening competition prices are advanced; and that in all cases the margin of profit has not increased proportionately to prices.

"Those who oppose maintaining differentials at this time contend that the value of the dollar expressed in terms of commodities shipped today is in reality but one-half its former value, and, therefore, a differential which was fixed at a given amount several years ago should, to have the same economic effect, be greater today; that there have been general increases in the prices of practically all commodities, in wages and in the charges for nearly all service, and that differentials should not be made an exception to the rule; and that as increased operating costs are the underlying reason for the proposed increased rates, the additional service represented by the differential, being more expensive than heretofore, should pay greater rates as well as other services.

"The adoption of specific increases in cents per unit instead of percentage advances will, of course, maintain existing relationships. However, the carriers almost uniformly oppose this method and it is not generally advocated by shippers. Further, the difficulty of its adoption is apparent because of the lack of reliable statistics from which to determine the probable additional revenue from a given increase. It should also be noted that everyone who advocated this method insisted that flat increases be applied but once to combination rates. The complicated nature of tariff publication to make such an arrangement effective, when different percentages of increase are being made in different groups, is apparent.

"Without attempting to pass finally upon the question whether in given cases differentials should or should not be maintained, it is evident that no general program of maintaining differentials can be made effective coincident with the increases here approved without materially delaying their effective date as definite testimony covering

individual situation is before us in only a very few cases. To maintain differentials by applying the percentage increases to basing rates and adding thereto existing differentials cannot be done without materially lessening the amount of additional revenue to be derived by the carriers, as generally differentials are added to rather than deducted from base rates.

"After carefully considering the situation we find that with the exceptions hereinafter noted general percentage increases made to fit the needs of the groups of lines serving each of the four groups must be considered for present purposes the most practicable. This conclusion is without prejudice to any subsequent finding in individual situations."

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1. In the Matter of the Applications of Carriers in Official, Southern, and Western Classification Territories for Authority to Increase Rates (1920), 58 I. C. C. Rep. 220, 243, et seq.

#### 611-AA. INCREASES IN RATES ON INDIVIDUAL COMMODITIES.

In *Increased Rates, 1920*,<sup>1</sup> the Commission stated: "Considerable evidence was presented with respect to the rates upon a number of individual commodities, including coal, lumber, cement, fruits and vegetables, petroleum, brick, sand, gravel and rock, asphalt, slag, grain, live stock, packing-house products, ore, bullion, potash, salt, fertilizers, and terra cotta.

"Various issues have been raised or are presented as to these commodities, the principle of which are as follows: (a) Whether there should be departures from the general percentage increases by maintaining differentials or by the application of specific increases instead of percentages; (b) whether maximum increases should be provided in order to avoid the full percentage increase upon relatively high rates from distant points of production to important markets; (c) whether because of the high cost of production and marketing of some commodities, the percentage increases proposed by carriers will result in a cost delivered at points of market or consumption so great as to curtail production and distribution, an undesirable situation at this time of world shortage of commodities; (d) whether a more general necessary use warrants a lower transportation charge; (e) whether the rates effective June 24, 1918, before General Order No. 28 became effective, should be made the basis of readjustment now by applying thereto a 25 per cent increase and superimposing thereon the percentage increases now found reasonable. Our general conclusions as to the impracticability of specific increases or of attempting now to maintain differentials dispose of a number of these contentions. It should also be said that while we do not here sanction specific increases in lieu of percentages, we are not to be understood as expressing disapproval of increases of that character made by the Director General. Such increases were made under war conditions and under circumstances that do not now exist.

"Our attention was called at the hearing to a number of formal complaints now pending, and we are asked to except from the general increase the rates in issue in those complaints. This would have the effect, during the pendency of those proceedings, of giving the rates in question a preferred standing and of exempting them from the

general increase. In our opinion, a fairer disposition will be attained by applying the general increase to these rates, with the understanding that this action is without prejudice to any future findings."

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1. In the Matter of the Applications of Carriers in Official, Southern, and Western Classification Territories for Authority to Increase Rates (1920), 58 I. C. C. Rep. 220, 247, et seq.

**612. Investigation and suspension of new rates, charges, regulations or practices.**

See "*Jurisdiction of Interstate Commerce Commission over freight rates and charges,*" Section 613, post.

**613. Jurisdiction of Interstate Commerce Commission over freight rates and charges.**

**613-A. CONTROL OF THE COMMISSION OVER FREIGHT RATES AND CHARGES GENERALLY.**

The important duties of the Interstate Commerce Commission in respect to railroad rates, include the duty of inquiry as to the management of the business, with the right to compel complete and full information concerning it, and the duty of seeing that there is no violation of the long-and-short-haul clause of the Act, or any prohibited discrimination, rebates, or other device to give undue preference, and also that the publicity required by Section 6 of the Act is observed.<sup>1</sup>

In *Advances in Rates—Western Case*<sup>2</sup> the Commission stated: "It is doubtless true that in its control over the charges which our railroads may make this Commission exercises a power so extensive as to justify the broadest consideration of the economic and financial effect of its orders. By its decisions in the *Abilene Cotton Oil case*, and in the *Illinois Central case*, 215 U. S. 452, the Supreme Court has erected this Commission into what has been termed 'an economic court,' or to give it a more commonplace definition, but one perhaps of stricter legal analogy, a select jury to pass upon the reasonableness and justness of railroad rates, rules, and practices. Within broad lines of discretion the courts regard the conclusions of the Commission on questions of fact as final. There is an appeal upon questions of law by the carriers to the courts, but unless a constitutional guaranty is violated the order of this Commission is final, provided, of course, the Commission does not overstep the jurisdictional limits placed upon it by the statute. And as to the shipper this tribunal is his one and only resort against injustice.

"We must not regard too seriously, however, the effort of railroad counsel to establish this Commission *in loco parentis* toward the railroads. We must be conscious in our consideration of these rate questions of their effect upon the policy of the railroad and, ultimately, upon the welfare of the state. This country cannot afford to have poor railroads, insufficiently equipped, unsubstantially built, carelessly operated. We need the best of service. Our railroad management should be the most progressive. It should have wide latitude for experiment. It should have such encouragement as would attract the imagination

of both the engineer and the investor. Nevertheless, it is likewise to be remembered that the Government has not undertaken to become the directing mind in railroad management. We are not the managers of the railroads. And no matter what the revenue they may receive there can be no control placed by us upon its expenditure, no improvements directed, no economies enforced."

1. Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co. (1897), 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. Rep. 896.
2. In Re Investigation of Advances in Rates by Carriers in Western Trunk Line, Trans-Missouri and Illinois Freight Committee Territories (1911), 20 I. C. C. Rep. 307, 317.

#### 613-B. POWER OF COMMISSION TO DETERMINE RATES, AND TO FIX MAXIMUM, MINIMUM, OR PRECISE RATES.

Section 15 of the Interstate Commerce Act (*as amended June 29, 1906, June 18, 1910, and February 28, 1920*) reads as follows:

(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

The Commission is authorized to condemn an existing rate and order a reduction of that rate, or prescribe a reasonable maximum rate to be charged in the future only when, upon consideration of all the facts, circumstances and conditions appearing, it is of the opinion that the rate complained of is unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial.<sup>1</sup>

The power of the Commission to fix minimum as well as maximum rates was conferred by the Transportation Act of February 28, 1920. Prior to that time the Commission had authority, when declaring a given rate unlawful, to fix in its place the maximum which might be charged, but not to fix the minimum. Many of the most important adjudications by the Commissions involved the rate of one to another. The Commission was, therefore, unable in adjusting a rate schedule for the primary purpose of eliminating discrimination, to protect carriers involved as a whole from the impairment of their total revenue.<sup>2</sup>

1. Marshall Oil Co. v. Chicago & N. W. Ry. Co. (1908), 14 I. C. C. Rep. 210; Dallas Freight Bureau v. Missouri K. & T. Ry. Co. (1907), 12 I. C. C. Rep. 427.
2. The more important cases in which it was held that the Commission had no authority to prescribe a minimum rate are as follows: Kent Co. v. New York C. & H. R. Rd. Co. (1909), 15 I. C. C. Rep. 439; Coal Rates from Oak Hills, Colo., (1914), 30

I. C. C. Rep. 505, 508; Boileau v. Pittsburgh & L. E. Rd. Co. (1912), 24 I. C. C. Rep. 129, 133; Rates to or from Certain Points in the Chicago Switching District (1915), 34 I. C. C. Rep. 234, 241; Memphis Freight Bureau v. Baltimore & O. Rd. Co. (1913), 28 I. C. C. Rep. 543, 547.

#### 613-C. COMMISSION MAY DETERMINE AND PRESCRIBE JUST AND REASONABLE REGULATIONS AND PRACTICES.

Section 15 (1) of the Interstate Commerce Act (*as amended June 29, 1906, June 18, 1910, and February 28, 1920*), provides that the Commission may determine and prescribe what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed.

It may, therefore, after investigation, find a particular rate to be unlawful, and prohibit the exaction of that rate.<sup>1</sup>

The Commission has authority whenever the unreasonableness of the rate is in issue.<sup>2</sup>

Upon the most restricted interpretation of the fifteenth section of the statute, the Commission has jurisdiction over any rule or regulation affecting the rate of transportation.<sup>3</sup>

In the *Transit Case*<sup>4</sup> the Commission stated: "It is impossible to compare the fifteenth section as it stood prior to the amendment of 1906 with the same section today without reaching the conclusion that it was the intention of the Congress to invest this Commission with full authority over interstate rates and all regulations or practices entering into those rates and determining their value and availability to individuals or communities. As to their reasonableness or discriminatory effect transit privileges, and all rules or regulations in connection therewith, are subject to the regulating authority delegated by the Congress to this Commission, and in the exercise of that authority rules and regulations susceptible of possible discriminatory or other unlawful application may be condemned and other rules or regulations prescribed, and to this end we may require a strict accounting, not only of interstate transit and nontransit tonnage, but local intrastate tonnage as well. *I. C. C. v. Goodrich Transit Co.*, 224 U. S., 194, decided April 1, 1912."

The determination of the reasonableness of the rule or regulation of a tariff is within the exclusive jurisdiction of the Interstate Commerce Commission and a State court is without jurisdiction to pass upon that question or even to consider it.<sup>5</sup>

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1. Pennsylvania Millers' State Assn. v. Philadelphia & R. Ry. Co. (1900), 8 I. C. C. Rep. 531.
  2. Porter v. St. Louis & S. F. Rd. Co. (1909), 15 I. C. C. Rep. 1.
  3. In the Matter of the Investigation into the Substitution of Tonnage at Transit Points (1912), 24 I. C. C. Rep. 340, 343; Larkin Co. v. Erie & W. Transportation Co. (1912), 24 I. C. C. Rep. 645, 647.
  4. *Transit Case: In the Matter of the Investigation into the Substitution of Tonnage at Transit Points* (1912), 24 I. C. C. Rep. 340, 343.
  5. Southern P. Co. v. Frye & Bruhn, Inc. (Wash. 1914), 143 Pac. 153, 156.

#### 613-D. COMMISSION MAY ORDER CARRIERS TO CEASE AND DESIST FROM THE FULL EXTENT OF THE VIOLATIONS FOUND.

The statute empowers the Commission to make an order that the carrier or carriers shall cease and desist from any violations to the

extent to which the Commission finds that the same does or will exist, and to not thereafter publish, demand, or collect any rate, fare or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and to adopt the classification and to conform to and observe the regulation or practice so prescribed.<sup>1</sup> The authority conferred upon the Commission by section 15 of the Act to notify defendant carriers to cease and desist from violating any of its provisions extends to section 1 prohibiting unjust and unreasonable charges.<sup>2</sup>

Where the Commission has determined that the rates contained in an established schedule are unreasonable it has the power not only to award reparation, but to command the carriers to desist from violation of the Act in the future, thus compelling the alteration of the old, and of the filing of a new schedule of rates.<sup>3</sup>

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1. Section 15 (1) Interstate Commerce Act (as mentioned June 29, 1906, June 18, 1910, and February 28, 1920.)
  2. Interstate Commerce Commission v. Chicago, B. & Q. Rd. Co. (1899), 94 Fed. Rep. 272.
  3. Texas & P. Ry. Co. v. Abilene Cotton Oil Co. (1907), 204 U. S. 426, 441, 27 Sup. Ct. Rep. 350, 51 L. Ed. 553; reversing, 38 Tex. Civ. App. 366, 85 S. W. 1052.

#### 613-E. POWER OF COMMISSION TO INVESTIGATE NEW RATE, CLASSIFICATION, REGULATION OR PRACTICE.

Section 15 (7) of the Interstate Commerce Act (*as amended June 29, 1906, June 18, 1910, and February 28, 1920*) provides as follows:

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice.

It is individual rates or joint rates or charges which may be investigated by the Commission in the exercise of its powers under the Act, and not primarily systems of rates.<sup>1</sup>

Where new rates are filed the Commission, under section 15 of the Act, is authorized, on its own initiative, to determine the propriety of such new rates and, pending such determination, to suspend the operation of the schedules stating such new rates.<sup>2</sup>

Where proposed rates involve increases or decreases they are new rates, as to which the Commission's jurisdiction is full and complete under section 15 of the Act; and if rates in which no change is proposed be not new rates, then they are necessarily rates "demanded, charged or collected," and their investigation is proper under section 15.<sup>3</sup>

In *Wickwire Steel Co. v. New York C. & H. R. Rd. Co.*<sup>4</sup> the Commission stated: "With the contention that an issue of discrimination in the sense of preference and prejudice under section 3 of the act cannot be considered in a proceeding relating to a rate increased since 1910 we are unable to agree. Considering that portion of section

15 relating to new schedules, which, as already indicated, was invoked by complainants in argument, it will be noticed that the act provides:

"Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare \* \* \* the Commission shall have, and is hereby given authority, either upon complaint or upon its own initiative without complaint \* \* \* to enter upon a hearing concerning the propriety of such rate, fare, charge, etc. \* \* \*

"Surely such a term as 'propriety' does not limit the Commission to considering only the reasonableness of the rate without reference to other considerations entering into its propriety. This term seems comprehensive enough to cover all the considerations entering into a rate, such as its reasonableness *per se*, its relative reasonableness, or its preferential or prejudicial character. Complainant's attempted limitation of the meaning of the act is rested on the provision as to burden of proof quoted above, which follows the portion of section 15 last quoted. This provision would seem to mean, both from its language and from its position in the paragraph, simply that when the new rate is an increased rate, as to one issue only, namely, whether it is just or reasonable, the burden of proof shall be on the carrier. While it may be conceded that when the rate is an increased rate this particular issue is one necessarily and unavoidably a part of the case, it does not follow that it must be the sole issue. Even though the Commission in the case of an increased rate always is to consider whether it is just and reasonable, it is not precluded from considering the rate from other viewpoints, such as that of its preferential or discriminatory character. In view of the general import of the language of the paragraph taken as a whole, to argue the contrary would seem to be to torture the plain meaning of the act into a restricted sense in nowise necessary inferable from its terms."

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1. Lehigh Valley Rd. Co. v. United States (1913), 204 Fed. Rep. 986, 990.
  2. Coal Rates from Oak Hills, Colorado (1914), 30 I. C. C. Rep. 505, 508.
  3. Switching at Galesburg, Ill. (1914), 31 I. C. C. Rep. 294, 297.
  4. Wickwire Steel Co. v. New York C. & H. R. Rd. Co. (1914), 30 I. C. C. Rep. 415, 419.

#### 613-F. POWER OF COMMISSION TO RESTRAIN ENFORCEMENT OF NEW RATE, CLASSIFICATION, REGULATION OR PRACTICE PENDING INVESTIGATION OF THE SAME.

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##### *Provisions of the statute.*

Section 15 (7) of the Interstate Commerce Act (*as amended June 18, 1910, and February 28, 1920*), reads as follows:

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective.

If any such hearing can not be concluded within the period of suspension, as above stated, the Commission may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of thirty days, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period,<sup>1</sup> but, in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid such portion of such increased rates or charges as by its decision shall be found not justified.

The final determination of the question of the reasonableness or unreasonableness of an interstate freight rate rests with the Interstate Commerce Commission, and there is no disposition on the part of the court to intrude upon the jurisdiction of that tribunal.<sup>2</sup>

The Circuit Court of the United States is without jurisdiction to enjoin the filing, publication, or enforcement by a railroad company of an interstate rate, on the ground that it is unreasonable or discriminatory, in advance of action thereon by the Interstate Commerce Commission, which is vested by the Interstate Commerce Act with exclusive jurisdiction to determine such questions in the first instance.<sup>3</sup>

In *Wickwire Steel Co. v. New York C. & H. R. Rd. Co.*<sup>4</sup> the Circuit Court of Appeals for the second circuit held that the circuit court has no jurisdiction of a suit to enjoin an advance in freight rates on a commodity pursuant to a conspiracy to discriminate against certain shippers, though section 9 of the Act provides that one claiming damages by a carrier may elect to complain to the Commission or sue in the federal courts.

The Commission is not concerned with the motives of the carriers which lead to an increase in rates, provided the rates which it is proposed to establish, are reasonable. It does not sit as a supreme traffic manager for the railroads of the country. Consideration of the policy which the railroads may pursue is not a matter delegated to it so long as such policy does not infringe upon the prohibitions of the law.<sup>5</sup>

#### *Importance of the power.*

One of the important additions by the Mann-Elkins Act of 1910 is the authority conferred upon the Commission to suspend the operation of proposed changes in rate schedules until the propriety and reasonableness thereof may be investigated. The exercise of this authority results in the elimination, in many cases, not only of the vexatious and impossible undertaking of complete or approximate reparation for damages but of the inevitable confusion and detriment to all concerned which follow the exaction for a time of unreasonable increased rates and their subsequent condemnation.<sup>6</sup>

The provision of the Act governing the suspension of new schedules gives to the Interstate Commerce Commission authority to make such order in reference to a rate, fare, charge, classification, regulation, or practice as may be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice became effective.<sup>7</sup>

*Construction of the law.*

In *Advances in Rates—Western Case*,<sup>8</sup> the Interstate Commerce Commission made the following interesting statement: "At the threshold of this inquiry we are required to give interpretation to a new provision of the act to regulate commerce, which reads:

"Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect, and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice had become effective. *Provided*, that if any such hearing cannot be concluded within the period of suspension, as above stated, the Interstate Commerce Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At any hearing involving a rate increased after January first, nineteen hundred and ten, or of a rate sought to be increased after the passage of this act, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carriers, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

"In the last sentence of this provision it is said that the burden of proof to show that 'the increased rate' or proposed rate is just and reasonable shall be upon the common carrier. It is urged with much force and an extensive citation of authority, that the purpose of this provision was to limit the investigation of the Commission to the consideration of the necessity for 'the increase in the rate.' The purpose of Congress, it is said, was to regard all rates in effect on January 1, 1910, as the maxima, which could not be increased until it was shown that there was reason and necessity for the specific increase made. This would limit our investigation as to all rates increased since that time to the simple question, What additional expenses have attached to the movement of these articles which make proper an increase in the rate?

"Such a construction of the statute is suggested by decisions of the English courts in interpreting the railway and canal act of 1894. We think, however, it is clear from the language of that statute, as well as its history, that the purpose of Congress differed from the purpose of Parliament. The English law was based on a legislative conclusion that existing rates were already sufficiently high and should not be increased excepting as transportation costs increased. Therefore, the English commission was to deal with the increase itself in the rate and not with the increased rate. This distinction is fundamental in the consideration of the laws of the two Governments.

"The British Parliament in 1891 and 1892 passed a series of public acts establishing the maximum rates and charges assessable by the railway and canal companies of Great Britain and Ireland. These acts became effective upon December 31, 1892. On the day immediately following, viz., January 1, 1893, the carriers took advantage of the liberal scale of class rates provided for in these parliamentary acts.

and advanced a great number of such rates which were lower than the maxima allowed and which had obtained for many years. The Railway and Canal Commission was without authority to check such increases and restore previously existing schedules. At once, therefore, it was perceived that the effect of the new legislation by Parliament under which relief had been hoped for by the shippers was to place it within the power of the carriers to increase all rates up to the high class rates fixed by parliamentary act.

"It was to remedy this situation that the railway and canal traffic act of 1894 was passed providing that 'where a railway company has either alone or jointly with any other railway company or companies since the last day of December, 1892, directly or indirectly increased, or hereafter increase, directly or indirectly, any rate or charge, then, if any complaint is made that the rate or charge is unreasonable, it shall lie upon the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to show that the rate or charge is within any limit fixed by an act of Parliament or by any provisional order confirmed by act of Parliament.'

"Lord Justice Smith gave the history of this act in the *Mansion House case*, 9 R. & C. T. Cases, p. 58, in these words:

"What the legislature did was obvious. We know how, when the new maxima came in, the companies put up their rates, and as regards many of them they put them up to their maxima, and it became a question for traders and the community at large, and the legislature said, when they found this had happened, we will go back two years and draw a line along there and say that it is probably the proper rate two years ago, which they had been charging they began putting up their rates to their maxima. We will just draw a line along there, and if they have increased them since that date, then we will put upon the railway company the onus of justifying that increase. That is the English of that act of Parliament, and that I have no doubt about.

"The effect of this enactment was to cast upon the railway company the burden of proving 'that the increase of the rate was reasonable.' The act to regulate commerce, on the other hand, requires the carrier to show the reasonableness of the increased rate. Under the act of Parliament, the carrier is called upon to justify the difference between its previously existing rate and the rate established, while under the act of Congress the carrier is called upon to prove that the new rate as a whole is reasonable. This distinction is clearly recognized in the opinion of Smith, L. J., in the *Mansion House Case*, 9 R. & C. T. Cases, at page 209, wherein it is said:

"There was an ingenious point taken by Mr. Russell, namely, that if the rate in the whole was reasonable, nothing more was to be inquired into. That really whittled the act of 1894 down to the procedure in vogue before 1894. The question then always was whether the rate or charge was reasonable, and this act, as I read it, makes the question whether the increase was fair and reasonable.

"And again, in the same case, Kay, L. J., at page 201, says:

"That is where there has been an increase. If any complaint is made that the rate or charge is unreasonable it shall lie on the company to prove that the increase, not that the rate or charge, but that the increase of the rate or charge, is reasonable.

"And on page 200:

"What the company is bound to prove is that the increase has been reasonable, and they do not show that by merely showing that the present charge is reasonable.

"There is, however, another and broader view by which we can determine the meaning of Congress. For more than 20 years Congress by express statutory declaration fixed the measure of the carrier's charge at 'a just and reasonable rate.' There was no check upon the

initiative of the carrier. Any rate filed and published in accordance with the requirements of the law was presumed to be reasonable, and a direct proceeding of attack upon complaint was necessary to raise before this Commission the question whether or not it conformed to the standard set by the law. For a period of years the tendency of rates was downward, owing in great part to active competition between the carriers for traffic. Rates were made from day to day, and as between one shipper and another, by means of rebates from the standard published rate. This led to extreme dissatisfaction on the part of the public, and to the serious injury of the roads themselves. To meet this situation the carriers attempted to form traffic associations by which under severe penalties they were bound to each other by contract to exact the published rates. Under decisions of the Supreme Court of the United States, however, these alliances were declared unlawful, and there then followed the development of the 'community of interest' plan by which, through the medium of one group of financiers or another, the carriers of a certain territory became harmonized. They no longer competed by cutting rates, because they were subject to a common control, or at least were dominated by interests that were sympathetic. There resulted an era of unexampled prosperity among the railroads as a whole. Net revenues increased, the stronger roads of higher credit absorbed the smaller; new lines were projected by the greater roads; small lines were articulated into large and connected systems; and with the development on the part of the carriers of the advantages of concord came an evident determination not only to make rates stable but if possible to bring about their increase. Accordingly, for several years past the brief body of protest coming from shippers to this Commission has been against increases in rates, and the Commission being unable to stay these increases, the shippers sought from the Congress the enactment of a law by which the power would be given to this Commission, when public reasons made advisable such a course, to lay a restraining hand upon the power and initiative which hitherto had rested with the carrier without limitation or constraint.

"Moreover, the Federal courts found themselves embarrassed by the appeals made to their equity powers against such increases. The courts differed upon the fundamental question of jurisdiction. In the cases where the courts assumed jurisdiction there resulted the greatest discrimination as between individual shippers and carriers, for as to some the increased rate was in effect. With such a history before it Congress deemed it advisable to lodge with this Commission, which alone under the *Abilene case*, 204 U. S. 426, has power to determine the reasonableness of a rate, the power to restrain for a time an increased rate until a determination can be had as to whether this rate conforms to the requirement of the statute or is but the evidence of the exercise of an arbitrary power.

"The National Legislature has not fixed, as in England, a body of maximum rates. It has not been declared that the rates of January 1, 1910, are to be regarded as either above or below the old and long established standard of reasonableness. The statute contains no intimation that we are to gage an increased rate which is suspended by any other measure than that by which we would gage any

existing rate that might be complained of. The power to suspend is ancillary to the general power of investigation, it being the mind of Congress that it was a healthier and wiser policy that there should be a reasonable exercise of such power of suspension than that either the courts should continue to inadequately deal by injunctive process with a problem the ultimate solution of which did not rest within their purview, or that the shipping public should be subjected to continuing instability of rates and consequent commercial disturbance. Moreover, the duty having been laid upon the carriers to fix reasonable rates, it was neither harsh nor oppressive to require them to make justification when such rates were to be increased.

"Regarded from this point of view, we cannot but conclude that Congress did not intend to say to this Commission: The rates obtaining January 1, 1910, are maxima, and if a carrier attempts to increase them it must give the reason for the increase, showing what new burden of transportation expenses it has suffered which justifies such increase. The question before the Commission is that which would have arisen had these rates gone into effect and a formal complaint been made against them as unjust and unreasonable. We may establish the rates proposed as reasonable, one or all of them, or reduce the proposed rates. We may continue in effect the present lower rates, or we may reduce the existing rates. For 'the Commission may make such order in reference to such rate \* \* \* as would be proper in a proceeding initiated after the rate had become effective.' The purpose of Congress was to give this Commission the same plenary power over increased rates that since the enactment of the Hepburn Act it has enjoyed over other rates."

*When Commission will exercise the power to suspend new tariffs containing advances in rates.*

In its annual report to Congress for the year 1912, the Commission stated: "In the exercise of its authority to suspend the operation of new tariff schedules the Commission has not understood that it was the purpose of the provision of section 15 of the act of 1910 that, as a matter of course, all advances in rates should be suspended; but upon the contrary has proceeded upon the idea that it was the purpose of this provision that it should exercise sound discretion in these matters. Therefore, upon such preliminary consideration as it has been practicable to give, the Commission has undertaken to distinguish between current changes in rates which might be regarded as natural and normal readjustments occurring in the ordinary course of business, and distinct and material advances for the definite purpose of increasing rates; and in the latter class of cases it has undertaken to scrutinize the apparent reasons therefor and has acted in the light of another provision of amended section 15, which casts upon the carriers the burden of justifying rates advanced after January 1, 1910.

"In the ordinary course of business there are made during the year many thousand of changes in rates, involving slight reductions and advances, to which no objection is made on the part of the shipping public, and which do not seem to warrant suspension and investigation by the Commission, and are therefore permitted to become effective:

Generally speaking, important advances in rates are made the subject of protest by shippers. When such protests are received by the Commission the tariffs in question are at once examined to determine the amount and extent of the proposed changes, and notice of the protest is sent to the interested carriers by letter, if there is time to conduct the correspondence in that way; if not, the carriers are notified by wire of the protest and requested to state their reasons for the proposed change. After an examination of the tariffs and consideration of the matters stated in the protests from the shippers, as well as of the reasons given by the carriers, the Commission determines whether there is a probable cause for suspending the operation of the tariff pending an investigation into the propriety of the proposed advances, or whether it is proper to permit the same to become effective on the date fixed by the carrier, subject to later complaint by the shipper in the usual manner.

"For the purpose of securing the fullest possible information to guide the Commission in the exercise of a sound discretion in dealing with protests against proposed increases or changes in tariff schedules it has given publicity to a rule to the effect that ordinarily it will not suspend the operation of a new schedule in consequence of protests where same are not presented, when practicable, at least 10 days prior to the effective date of such schedule. This rule, however, is not for the purpose of indicating that the Commission may not upon its own initiative suspend the operation of new tariff schedules, even without the receipt of protests, when in its judgment the ends of justice seem to require it; nor has the Commission strictly enforced or observed this rule in cases where it seemed certain that the proposed changes should be suspended pending the investigation."<sup>9</sup>

Sometimes the protest and request for suspension relates to reduced rates, or to a tariff which contains both increased and reduced rates, the changes proposed being an effort to correct a misalignment of rates. The Commission has declined to suspend proposed reduced rates except in an instance where resulting undue discrimination would apparently follow the establishment of those rates.<sup>10</sup>

In *Switching at Galesburg, Ill.*<sup>11</sup> the Commission stated: "The respondent raises a jurisdictional question. It refers to that portion of section 15 of the act relating to the Commission's jurisdiction regarding new schedules, which reads in part as follows:

"Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and is hereby given, authority \* \* \* to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing, and the decision thereon the Commission \* \* \* may suspend the operation of such schedule.

"Reference is also made to that portion of the same paragraph of the act which provides that in a hearing involving a rate increased since January 1, 1910, the burden of proof to show that the increased rate is just and reasonable shall be on the common carrier. It is contended that under these provisions the Commission was without power to suspend the tariff in question for the reason, first, that it did not increase any rates, and, secondly, that it did not state any new 'regulation or practice affecting any rate, fare or charge,' within the meaning

of the provision. The argument that the cancellation of the Burlington switching rate did not increase any rates within the meaning of the act is that while a shipment over the Rock Island Southern destined to industries on the Burlington would, with the switching rate canceled, have to pay a draying charge greater than the switching charge, such a consequence would not involve an increase in 'rates' as the phrase is used in the act. We are of the opinion that the question whether or not the proposed schedule would effect an increase in rates is immaterial. We fail to perceive anywhere in the paragraph relating to the Commission's suspension power, the material portions of which are quoted above, or elsewhere in section 15, either in terms or by implication, any limitation of this power to rates, regulations or practices effecting increases in rates. The only reference to increases is contained in the portion of the section dealing with the burden of proof, and this surely cannot have the effect of limiting the general terms of the preceding portion of the section dealing with the suspension power. In practice the Commission has frequently suspended schedules where no increases were proposed, but where the new rates threatened to create discrimination."

In *Wickwire Steel Co. v. New York C. & H. R. Rd. Co.*<sup>12</sup> the Commission stated: "Passing to the practice under this section, it is the fact that it is the Commission's custom to suspend new rates when it appears from protest or check of the tariffs that they will create unlawful discrimination. Many tariffs have been suspended solely for this reason. Some tariffs providing for reduced rates to many points and not publishing a single increased rate have been suspended solely upon the ground of discrimination. Moreover, the Commission has in investigation and suspension proceedings decreed the cancellation of suspended tariffs because the rates proposed therein were found to create unjust discrimination. *In the Matter of Advances in Charges for Switching Ice at Chicago*, 24 I. C. C., 660. Surely it is also open to the Commission to consider as a part of the test of the propriety of the new rate the circumstance that it will eliminate a discrimination existing under the adjustment which it is to supersede. This is not to say that the consideration as to whether the new rate effects or eliminates a discrimination can be urged in sole justification of the rate. A new increased rate might eliminate discrimination and yet be condemned for being unreasonably high. The fact, however, that it does eliminate discrimination should be given some weight in determining its propriety."

In *Coal Rates from Oak Hills, Colo.*<sup>13</sup> the Commission stated: "Under section 15, paragraph 1, of the act, the Commission, on its own initiative whenever it is of the opinion that any rates demanded, charged, or collected are in any way unlawful, may enter upon an investigation, hold full hearings, and determine and prescribe just and reasonable rates. Where new rates are filed the Commission, under section 15, paragraph 2, is authorized by similar means to determine the propriety of such new rates and, pending such determination, to suspend the operation of the schedules stating such new rates. In connection with the latter hearing the statute casts upon the carrier the burden of justifying any increased rates.

"As has already been observed, the proposed rates include some increases over and some decreases under the present rates, while in

other cases the proposed rates are the same as the present. The order herein shows plainly the intent of the Commission to enter upon a hearing concerning the propriety of the increases and the lawfulness of the rates under suspension, and provides that the operation of all schedules contained in the proposed tariff be suspended. Clearly, when the proposed rates involve increases or decreases they are new rates, and as to them the Commission's jurisdiction in this proceeding is full and complete by virtue of the second paragraph of section 15. If the rates in which no change is proposed be not new rates, then they are necessarily rates 'demanded, charged or collected,' and their investigation in this proceeding is proper under the first paragraph of section 15. And certainly there can be no doubt under the second paragraph of the Commission's power to suspend in its entirety the schedule stating these rates."

*Detailed rules of Commission in the suspension of rates.*

In *Oklahoma Traffic Assn. v. Abilene & S. Ry. Co.*<sup>14</sup> the Commission stated: "An unsuspended tariff item modifying a suspended item and published under special permission from the Commission takes effect on its lawfully proposed effective date, provided that the existing rates from and to the same points are properly canceled. At least this was the rule prior to June 14, 1915. Our order promulgated June 14, 1915, prohibits any increase in rates, fares, or charges, or any change in the classification, regulation, or practice temporarily continued in effect by the suspension of tariffs proposing to increase existing rates, fares, or charges, or to alter existing classifications, regulations, or practices. Item 2916-b in supplement No. 14 to Leland's tariff I. C. C. No. 1048 was authorized only to replace item 2916-a in supplement No. 10. Item 2916-a in supplement No. 10 was nugatory because only a reissue and repetition of item 2916-a in supplement No. 9, which was under suspension. The authority granted to correct item 2916-a in supplement No. 1—therefore cannot be construed as a vacation of the order suspending item 9 and was therefore nugatory. It is somewhat technical, perhaps, to distinguish between permission granted by the Commission to correct a suspended tariff item and permission to correct a nugatory reissue of the same item, but the danger of inadvertent vacations of suspensions of tariff items requires the observance of the distinction. Our rule promulgated June 14, 1915, subsequent to the transaction involved is intended to prevent just such complications as are presented in these proceedings."

*When rates are suspended the status quo is to be maintained.*

When the Commission suspends the operation of a tariff it is contemplated that rates sought to be increased or otherwise changed are to be continued in effect pending the investigation. In other words, it is expected that the status quo would be maintained until the proposed change therein can be fully investigated.<sup>15</sup>

*Commission has no power to suspend a schedule after it takes effect.*

The Commission is not empowered to suspend the operation of a schedule after it has gone into effect.<sup>16</sup>

*Power of Commission to suspend tariff on own motion.*

The Commission may upon its own motion suspend tariffs which are filed with it and institute proceedings of investigation.<sup>17</sup>

*Original exclusive jurisdiction of Interstate Commerce Commission over suspension of a published interstate classification or rate schedules.*

In the case of *Director General of Railroads, et al. v. Viscose Co.*<sup>18</sup> United States Supreme Court held that the Interstate Commerce Commission must be deemed to have had initial jurisdiction, exclusive of the Federal district courts, of a controversy presented by the contention of a shipper that an amendment or supplement to the appropriate freight tariff schedule, authorized by the Director General of Railroads, which became effective after the adoption of the Transportation Act of February 28, 1920, and by which the published classification and rates on silk were cancelled and the freight classification rule amended so as to include silk among the articles that would not be accepted for shipment as freight, was invalid, in view of the provisions of the Interstate Commerce Act, as that statute is amended to date. Mr. Justice Clarke, in delivering the opinion of the court, stated:

“Silk, artificial and natural, had been accepted by the railway carriers of the country for transportation as freight for many years prior to the action which gave rise to the question which the circuit court of appeals for the third circuit has certified herein to this court, and it had been classified in tariffs as first class. On January 21, 1920, Walker D. Hines, as Director General of Railroads, authorized an amendment or supplement to the appropriate freight tariff schedule so as to cancel the published classification and rates on such silk, and to so amend rule 3 of ‘Consolidated Freight Classification No. 1,’ as to include it among the articles ‘that will not be accepted for shipment.’”

“On the 28th of January, 1920, the supplement thus authorized was official or fiber silk for transportation under classifications which existed the 29th day of February following, and if no other action had been taken the result would have been to have excluded such silks from shipment as freight after the effective date, for after that date there would not have been any published rate applicable to them.

“The appellee, the Viscose Company, is an extensive manufacturer of artificial silk, 80 per cent of which ‘it maintains’ must be shipped as freight, and, claiming that it would suffer great and irreparable damage if the supplement to the tariff proposed by the appellants were allowed to become effective, on February 26th, three days before it would have taken effect, the company applied for and obtained a temporary, and later on a permanent, injunction from the district court of the United States for the eastern district of Pennsylvania, restraining the Director General of Railroads and the other appellants:

“(1) ‘From putting into effect and enforcing the provisions of the said supplement No. 2 to “Consolidated Freight Classification No. 1,” designed to cancel the existing classification of artificial silk as a commodity of freight,’ and

“(2) ‘From refusing to accept from the Viscose Company artificial or fibre silk for transportation under classifications which existed

prior to the effective date of said supplement, or under such other classification as may be put into effect thereafter.'

"An appeal from the district court carried the case to the circuit court of appeals, which certifies to this court the question:

"Did the district court have jurisdiction to decide the matter raised by the complainant's bill, and thereupon to annul the said action of the Director General of Railroads, and enjoin the carriers from complying therewith?"

Appellants contend that exclusive initial jurisdiction over the controversy here involved is in the Interstate Commerce Commission, and that the appellees should have applied to that tribunal for relief. It is argued that the proposed supplement, striking silks from the first class in the tariffs filed, was a change in classification, and that the change in rule 3, adding them to the list of commodities which would not be accepted for shipment as freight, was a change of regulation, and that over the reasonableness of both of these the Interstate Commerce Commission is given exclusive initial jurisdiction by §§ 1, 3, 6, 13, and 15 of the Interstate Commerce Act, (June 29, 1906, 34 Stat. at L. 584, chap. 3591, as amended June 18, 1910, 36 Stat. at L. 539, chap. 309, Comp. Stat. § 8563, 4 Fed. Stat. Anno. 2d ed. p. 337).

"On the other hand, it is argued by the appellees that for a common carrier to exclude a commodity from the tariffs and to refuse to accept it for shipment is neither classification nor regulation; and that an attempt to do such a thing presents a question of law for the courts,—that exclusion is not classification nor regulation.

"Section 1 of the Interstate Commerce Act makes it the duty of all carriers subject to its provisions to provide and furnish 'transportation upon reasonable request therefor \* \* \* to establish, observe, and enforce just and reasonable classifications of property for transportation \* \* \* and just and reasonable regulations and practices affecting classifications, rates, or tariffs \* \* \* and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property.' 36 Stat. at L. 539, 545, 546, chap. 309, Comp. Stat. § 8563, 3 Fed. Stat. Anno. 2d ed. pp. 351, 359.

"Section 3 of the act makes it unlawful for any carrier \* \* \* to subject \* \* \* 'any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.' February 4, 1887, 24 Stat. at L. 379, 380, chap. 104, Comp. Stat. § 8565, 4 Fed. Stat. Anno. 2d. ed. p. 379.

"Section 6 requires every carrier to print and file with the Commission schedules in form prescribed, showing \* \* \* the classification of freight in force \* \* \* and any rules or regulations which in any wise change, affect, or determine \* \* \* the value of the service rendered to the shipper. 34 Stat. at L. 584, 586, chap. 3591, Comp. Stat. § 8569, 2 Fed. Stat. Anno. 2d ed. p. 406.

"Section 13 gives to any person or corporation the right to apply to the Commission for relief on account of 'anything done or omitted to be done' by any common carrier subject to the provisions of this act, 'in contravention of the provisions thereof.' 36 Stat. at L. 539, 550, chap. 309, Comp. Stat. § 8581, 4 Fed. Stat. Anno. 2d. ed. p. 453.

"And § 15 declares that whenever there is filed 'a new individual or joint classification, or any new individual or joint regulation or practice,' the Commission shall have power to suspend the operation of such schedule, classification, regulation, or practice until, upon complaint or upon its own initiative, an investigation shall be made, and if the proposed classification or regulation is found to be unreasonable or otherwise in violation of the act, the Commission may find what will be just and reasonable in the premises, and may require the carrier thereafter to conform to its finding. 36 Stat. at L. 539, 552, chap. 309, Comp. Stat. § 8583, 4 Fed. Stat. Anno. 2d ed. p. 458.

"The power to suspend classifications or regulations when issued by the President was taken away from the Interstate Commerce Commission by the 'Act to Provide for the Operation of Transportation Systems While Under Federal Control,' etc. (March 21, 1918, 40 Stat. at L. 451, 456, chap. 25, Comp. Stat. § 3115 $\frac{3}{4}$ a, Fed. Stat. Anno. Supp. 1918, p. 757); but the power over them after hearing remained, and the power to suspend was restored when 'The Transportation Act, 1920,' approved February 28, 1920, became effective (41 Stat. at L. 456, 487). The action of the Director General of Railroads, under consideration in this case, may, therefore, be treated as if it had been taken by a carrier subject to the act.

"Without more, these references to the Interstate Commerce Act are sufficient to show that if the proposed change in the tariffs and in the rule, which we are considering, constituted a change of classification or of regulation within the meaning of the Commerce Act, there was ample and specific provision made therein for dealing with the situation through the Commission,—for suspending the supplement or rule, or annulling either or both if investigation proved the change to be unreasonable, and for providing for just treatment of shippers in the future. Strangely enough, it is a shipper, not a carrier, which here seeks to exclude the latter from this extensive jurisdiction of the Commission.

"The certificate does not state what the purpose of the Director General of Railroads was in attempting to make the proposed change, but whether it was to permanently refuse to carry artificial silk as freight because of its value or of the risk involved, or for any other reason, or whether the action was taken to clear the way for putting into effect a commodity rate higher than the first-class rate (as might be done under appropriate conditions, *Chamber of Commerce v. International & G. N. R. Co.* 32 Inters. Com. Rep. 247, 255; *Wheeling Corrugating Co. v. Baltimore & O. R. Co.* 18 Inters. Com. Rep. 125, 126), in either case it was necessary that the published classification of rates should be withdrawn by change of the tariffs on file, and that notice should be given, through rule or regulation, that the silk would not be accepted for shipment in the future. Thus the supplement involved a change in the contents of previously filed classification lists, and in a rule or regulation of the carriers.

"That 'exclusion is not classification' is an arresting but illusory expression. Classification in carrier rate-making practice is grouping,—the associating in a designated list, commodities which, because of their inherent quality or value, or of the risks involved in shipment, or because of the manner or volume in which they are shipped or loaded,

and the like, may justly and conveniently be given similar rates. To exclude a commodity from all classes is classification of it in as real a sense and with as definite an effect as to include it in any one of the usual classes. To strike artificial silk from the first class and to include it in the 'prohibited list,' which, for any cause, the carrier refuses to accept as freight, classifies it and sets it apart in a group subject to special treatment, as much as if it had been changed to the second class. We cannot doubt that the 'exclusion' in this case was an attempted 'classification,' and that the proposed change in rule 3 was an attempted change of regulation, applicable to artificial silks, and that, when challenged by the shipper, the reasonableness of both presented a question for decision within the exclusive initial jurisdiction of the Interstate Commerce Commission.

"Confirmation of this conclusion may be found in *Re Lake-and-Rail Butter & Egg Rates*, 29 Inters. Com. Rep. 45. There carriers on the Great Lakes issued a supplement to their tariffs (as was done here), adding to the list of commodities which would not be accepted for shipment, among other articles, butter, poultry, and eggs. This was defended on the ground that such traffic required refrigeration at a cost greater than it would bear. Upon complaint by shippers to the Interstate Commerce Commission that the proposed action was unreasonable, the supplement was promptly suspended, and, upon full hearing, it was held that the refusal to carry such commodities in the past, and the attempt to fortify such refusal for the future by filing tariffs declining in terms to receive them, were unduly prejudicial to the traffic involved, and, the request of shippers for such transportation being held reasonable, an order that it be furnished was authorized.

"The contention of the carriers, faintly made, that the common law, and not the Interstate Commerce Act, furnished the measure of their obligation to the public, was promptly overruled by the Commission, informed, as it was, by wide experience in traffic affairs and in the administration of the act.

"The importance to the commerce of the country of the exclusive initial jurisdiction which Congress has committed to the Interstate Commerce Commission need not be repeated and cannot be overstated (*Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51, L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *Baltimore & O. R. Co. v. United States*, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 304, 57 L. ed. 1494, 33 Sup. Ct. Rep. 938; *Minnesota Rate Cases (Simpson v. Shepard)*, 230 U. S. 352, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; *Texas & P. R. Co. v. American Tie & Timber Co.*, 234 U. S. 138, 146, 58 L. ed. 1255, 1258, 34 Sup. Ct. Rep. 885; *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 469, 59 L. ed. 1406, 1412, 35 Sup. Ct. Rep. 896; and *Loomis v. Lehigh Valley R. Co.*, 240 U. S. 43, 49, 60 L. ed. 517, 519, 36 Sup. Ct. Rep. 228); and, concluding, as we do, that this case falls plainly within that jurisdiction, the question asked by the Circuit Court of Appeals must be answered in the negative.

"Question answered, No."

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1. The Interstate Commerce Commission in proposing to Congress that legislation be passed changing the periods for suspension of proposed new schedules of rates.

stated; "We call attention to the advisability of changing the periods for which the Commission can suspend the operation of a proposed new schedule, suggesting that in lieu of the two periods now provided, the first being too short within which to dispose of any important case, thus necessitating in most cases the preparation and service of supplemental suspension orders, there be provided one period of one year.

"If the above-mentioned change is made it should, we think, be supplemented by a provision requiring the carriers to give not less than 60 days' notice of increased rates or charges. Under such a notice those who are affected by the charges would have more opportunity to ascertain accurately the effect of the proposed new schedule and to determine whether or not they ought to protest it; they would have more opportunity within which to properly prepare their protests and the reasons therefor; the carriers would have more time within which to present their reasons in support of the proposed schedules; and the Commission would have more time within which to determine whether or not it would suspend the schedules. It not infrequently happens now that schedules are suspended on the strength of protests filed a short time before the schedule is to become effective, and later protestant learns he was not fully informed or advised and withdraws his protest. It has been our practice, in important cases and where the time before the effective date of the schedule permitted, to hear the parties informally on the question of whether or not the schedules should be suspended, but in the great majority of cases there is not time for such proceeding." (30th Annual Report of Interstate Commerce Commission, 1916, p. 65.)

2. Arlington Heights Fruit Co. v. Southern P. Co. (1909), 175 Fed. Rep. 141, 142, reversed on other grounds and cause remanded, with directions to dismiss the suit, Southern P. Co. v. Arlington Heights Fruit Co. (1911), 191 Fed. Rep. 101, 111 C. C. A. 581.
3. Columbus Iron & Steel Co. v. Kanawha & M. Ry. Co. (1910), 178 Fed. Rep. 261, 101 C. C. A. 621.
4. Wickwire Steel Co. v. New York C. & H. R. Rd. Co. (1910), 181 Fed. Rep. 316, 104 C. C. A. 504.
5. In the Matter of the Investigation and Suspension of Advances in Rates for the Transportation of Coal by the Chesapeake & O. Ry. Co. et al. and Their Connections (1912), 22 I. C. C. Rep. 604, 612.
6. Twenty-fifth Annual Report of Interstate Commerce Commission (1911); Twenty-fourth Annual Report of Interstate Commerce Commission (1910). The Interstate Commerce Commission in recommending to Congress that there be granted to it the power to restrain advances in rates pending investigation as to their reasonableness gave the following reasons as to why such authority should be granted:

"Under the operation of the Interstate Commerce Act the right to initiate interstate rates rests entirely with the railway, which may, by giving thirty days' notice, put into effect any rate or any regulation or practice affecting a rate which it sees fit. The Commission is not required to approve these rates and has no authority whatever to condemn them. It can only act upon a rate so established by the railway in case a formal complaint is filed attacking that rate and after a full hearing. This is the express provision of the statute.

"It is certainly just that carriers should not be required to reduce their transportation charges, nor to alter their rules or practices affecting such charges, without opportunity to be heard upon their part, for these charges are, in essence, the property of the railway. It seems therefore ordinarily a just provision to require that formal notice shall be given the railway, with opportunity to justify its rates, before a reduction is ordered.

"When, however, the carrier advances a rate or so changes a regulation or practice as to impose upon the shipping public a higher charge or some more onerous condition an entirely different question is presented. Railway rates enter to a greater extent than might at first thought be supposed into the business operations of this country. The contracts of the coal operator, for example, run for a year, frequently for two years, and the margin of profit is such that an advance in the transportation charge of no more than 5 or 10 cents per ton may convert a profitable contract into a losing one. Engagements for the sale of grain are made upon the basis of the present rate, and an advance of 1 cent per 100 pounds may entail a loss in the transaction. The lumber manufacturer may arrange for his season's cut upon the basis of the existing tariff, and a change may mean disaster to his business.

"The above examples are not fancied cases. They have all been brought to the attention of the Commission within the past year in such a form as to present strong grounds for relief. Assuming that the advanced rate would be perfectly just in the end, it may nevertheless be entirely unjust to suffer it to go into effect at the time named by the carriers.

"In the majority of instances, perhaps, advances may properly be made before the reasonableness of the advanced rate has been finally passed upon by this Commission; but there are also many instances where great injustice must result unless matters can be kept in *statu quo* while proceedings are pending to test the reasonableness of the advance. Where a rate has been maintained for a considerable time and where business interests will be seriously affected by its change it is no undue hardship to require the carrier to continue that rate in effect until the propriety of the advance can be passed upon, and to finally make the advance itself at such time as will work no unnecessary injury. Certainly

there ought to be some tribunal to which shippers can appeal, with authority, if such a course seems just, to prohibit the advance or the change until the general question can be considered.

"At the present time it is not very clear whether such authority anywhere exists. Certainly the Commission does not possess it. It cannot itself by any order restrain the advance, nor can it, apparently, apply to the courts for such a restraining order unless the advance works of such a discrimination as is forbidden by the so-called Elkins Act, and this is not usually true of a mere increase in the rate. In several instances courts of equity have interfered to prohibit advances pending proceedings before the Commission. In these cases an injunction has been issued in favor of the complainants alone, so that at the present time the general public is paying the advanced rate, while the complainants are being charged the old rate. These injunctions were granted upon the filing of a bond—\$10,000 in one case and \$250,000 in the other. It is evident that the application of any such practice must result in discrimination and hardship to the general public.

"We therefore recommend that when an advance in rates or a change in any regulation or practice is attacked by a complainant to this Commission, the Commission shall have the power, in its discretion, after notice to and hearing of the parties, to prohibit the taking effect of the advance or change until the matter has been finally heard and determined.

"At all events Congress should definitely understand that we, under the present law, are powerless to act in reference to these advances except upon the filing of a formal complaint and after a full hearing of the case." (21st Annual Report of Interstate Commerce Commission, 1907, p. 9.)

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"In our last annual report attention was called to the fact that this Commission had no authority to restrain an advance in rates or a change in rule or regulation which imposes an additional burden. Railways may establish whatever interstate rates they choose. No proceeding can be begun before this Commission until the schedule establishing the rate has been filed. The order of the Commission, when made, cannot take effect in less than thirty days. If the investigation is to be one in reality as well as in name, if all parties are to be fully heard, as they should be, several weeks, and usually several months, must elapse before a conclusion resulting in an order can be reached. Meantime the rate established by the carrier remains in effect.

"No carrier should be required to reduce its rates without a fair hearing; neither, in our opinion, should the public be required to pay advanced rates without opportunity for a fair hearing.

"For some years carriers in Official Classification territory have prohibited by tariff regulation the consolidation at carload rates of shipments belonging to different individuals. The Commission has recently held that this rule is unlawful, and has directed those carriers to remove it from their tariffs. These carriers applied to the circuit court for an injunction suspending the order of the Commission during the pendency of suit to determine its lawfulness, and such injunction has been granted, thus holding in *statu quo* conditions as they have been until a final determination of the question.

"Carriers in Southern and Western Classification territory have not in the past prohibited such consolidation, but transcontinental lines now file tariffs, establishing January 1 this rule. The Commission is in receipt of earnest protest from shippers against such action. It is asserted that over 80,000 shippers are affected by it, and that business conditions will be seriously interfered with. There is every reason why that tariff should not take effect until the Supreme Court of the United States has passed upon the lawfulness of this regulation; and it ought not, in our opinion, be left to the grace of the carriers themselves to say whether such postponement shall or shall not be granted.

"Courts have in some instances interfered by injunction to prevent such advances, but their jurisdiction to do so is most vigorously combatted by the railroads. While this authority, if upheld, may prevent the exaction of unreasonable rates in some cases, its exercise must, in the nature of things, result in more or less confusion, and is quite likely to produce the very discriminations which the law is designed to prevent.

"For example, carriers filed notice of an advance in rates on boots and shoes from New England to Atlanta. Certain shippers made application to the circuit court for an injunction prohibiting such advance, which was granted upon condition that the shippers immediately apply to the Commission for a ruling upon the reasonableness of the proposed advanced rates. Thereupon the carriers, understanding that they could not publish one rate and collect another, withdrew their schedules, leaving in effect the old rate. Since complaint cannot be filed with the Commission against a rate which is not in effect, or at least which has not been duly published, it was impossible for the complainants to apply to the Commission. To meet this situation the court permitted a modification of its injunction so that carriers were allowed to publish the advanced schedule, but were restrained from collecting it. At the present time these carriers have established one rate by their tariff and under order of court are collecting another.

"It often happens that these tariffs are joint, being concurred in by connecting lines. The initial line is in one injunction and the delivering line in another.

In a suit brought to restrain an advance the court can only act upon the carrier within its jurisdiction. When a tariff has once been filed it cannot be changed without the consent of all parties to it. It may happen, therefore, that the initial carrier is enjoined from charging the rate named in the published schedule, while the statute makes it incumbent upon the delivering carrier to collect that rate under severe penalty. If the shipment is prepaid, what through rate shall the initial line receive and what part of that rate can it retain? If the shipment moves collect, what rate shall the delivering line insist upon and what is its division of the total charge?

"As was suggested in our previous report, these injunctions frequently run only in favor of the petitioners in the suit in which they are granted, and only in their favor upon the giving of a bond. It results, therefore, that carriers are collecting one rate of one shipper and a different rate of another shipper for the performance of the same service. It may be said that if the advanced rate is sustained the petitioner will be compelled to make up the balance of his payment under the bond, while if the advance is held unreasonable, the one who has paid it may recover reparation. But as a practical matter, the smaller shipper who cannot file the bond cannot and does not continue in business under the higher rate.

"It would be easy to multiply instances and illustrations showing the confusion and discrimination which now exist. We renew our recommendation of one year ago that this Commission be given authority to restrain the advance of a rate or the change of a rule, regulation, or practice pending proceedings before it to determine the reasonableness of the advance or the change, and we earnestly call attention to the necessity for immediate action." (22d Annual Report of Interstate Commerce Commission, 1908, p. 10, 11, 12.)

7. Rates on Lumber and Other Forest Products from Points in Arkansas and Other States to Points in Iowa, Minnesota and Other States (1914). 39 I. C. C. Rep. 371, 373.
8. Advances in Rates—Western Case: In Re Investigation of Advances of Rates by Carriers in Western Trunk Line, Trans-Missouri, and Illinois Freight Committee Territories (1911), 20 I. C. C. Rep. 307, 310, et seq.
9. Twenty-sixth Annual Report of Interstate Commerce Commission (1912).
10. Twenty-seventh Annual Report of Interstate Commerce Commission (1913).
11. Switching at Galesburg, Ill. (1914), 31 I. C. C. Rep. 294, 296.
12. Wickwire Steel Co. v. New York C. & H. R. Rd. Co. (1914), 30 I. C. C. Rep. 415, 420, et seq; In the Matter of the Request for Suspension of Reduced Rates on Packing-House Products and Fresh Meats from Fort Worth, Tex., to Mississippi River Crossings and Points East Thereof (1911), 21 I. C. C. Rep. 68, 70.
13. Coal Rates from Oak Hills, Colo. (1914), 30 I. C. C. Rep. 505, 508.
14. Oklahoma Traffic Assn. v. Abilene & S. Ry. Co. (1915), 36 I. C. C. Rep. 329, 332.
15. Lafayette Chamber of Commerce v. Alabama & V. Ry. Co. (1915), 33 I. C. C. Rep. 302, 303; Lumber to Texas Ports (1917), 44 I. C. C. Rep. 275.
16. Wickwire Steel Co. v. New York C. & H. R. Rd. Co. (1914), 30 I. C. C. Rep. 415, 416.
17. New England Investigation: In the Matter of Rates, Classifications, Regulations, and Practices of Carriers (1913), 27 I. C. C. Rep. 560, 614.
18. Director General of Railroads, et al. v. Viscose Co. (1921), 65 L. Ed. 170, 254 U. S. 498, — Sup. Ct. Rep. —.

#### 613-G. TIME WHEN ORDERS OF COMMISSION TAKE EFFECT.

Section 15 (2) of the Interstate Commerce Act (*as amended June 29, 1906, June 18, 1910, and February 28, 1920*), reads as follows:

Except as otherwise provided in this Act, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

Under the law, as it existed prior to the amendment of February 28, 1920, the Commission was empowered to prescribe rates for future periods of not exceeding two years.<sup>1</sup>

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1. Pacific Coast Lumber Mfrs. Assn. v. Northern P. Ry. Co. (1909), 16 I. C. C. Rep. 465.

The provision of Section 15 of the Hepburn Act of June 29, 1906, relating to the orders of the Commission read as follows:

"All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than 30 days, and shall continue

in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission unless same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction."

Under the provisions of the original act of February 4, 1887, the United States Supreme Court had held that the Commission possessed no power to prescribe rates for the future. The following are the controlling decisions on this subject:

The power of the Interstate Commerce Commission to pass upon the reasonableness of existing rates of carriers does not necessarily imply a right on the part of the Commission to prescribe rates for carriers in advance of any issue made in the subject, but the function of the Commission is to consider and give proper weight to the facts on which the reasonableness of a rate in a given case depends when such a case is presented. (*Cincinnati N. O. & T. P. Ry. Co. v. Interstate Commerce Commission* (1896), 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. Rep. 700.)

An inquiry whether rates of carriers are reasonable or not is a judicial act; but to prescribe rates for the future is a legislative act. (*Interstate Commerce Commission v. Cincinnati N. O. & T. P. Ry. Co.* (1897), 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. Rep. 896.)

Incorporating into the Interstate Commerce Act the common law obligation resting upon the carrier to make all its charges reasonable and just, and directing the Commission to execute and enforce the provisions of the act, do not by implication carry to the Commission or invest it with power to exercise the legislative function of prescribing rates which shall control in the future. Section 6 of such statute expressly recognizes the right of the carrier to establish, increase, or reduce rates, on condition of publishing and filing them with the Commission. The Interstate Commerce Commission has no power to prescribe a tariff of rates which shall control in the future, and therefore cannot invoke a judgment in mandamus from the courts to enforce any such tariffs by it prescribed. (*Ibid.*)

Congress has not conferred upon the Interstate Commerce Commission the legislative power to prescribe rates, either maximum or minimum or absolute, nor has it authorized the Commission to obtain from the courts a peremptory order that in the future the railroad companies shall follow the rates which it has determined to have been in the past reasonable and just. (*Interstate Commerce Commission v. Alabama M. Ry. Co.* (1897), 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. Rep. 45.)

#### 613-H. BURDEN OF PROOF AS TO REASONABLENESS OF INCREASED RATE ON COMMON CARRIER.

Section 15 (7) of the Interstate Commerce Act (*as amended June 18, 1910*) provides as follows:

At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

See "*Burden of proof as to reasonableness of increased rates upon common carrier,*" Section 611-P, ante.

#### 613-I. PRIMARY JURISDICTION OF COMMISSION TO DETERMINE REASONABleness OR UNREASONABLENESS OF AN INTERSTATE RATE.

The United States Supreme Court in the case of *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*<sup>1</sup> decided the important question that relief from unreasonable freight rates on interstate shipments is by action before the Interstate Commerce Commission only. This was a suit to obtain relief in a state court from an alleged unreasonable interstate freight rate exacted by a common carrier from a shipper. The oil company alleges that the railway company has exacted from it on shipments of cotton seed from various points in Louisiana to Abilene, Tex., the payment of an unjust and unreasonable rate, and there were averments that such rate was discriminatory, constituted undue preference, and amounted to charging more for a shorter than for a longer

haul. The railway company resisted, on the ground that the shipments were interstate and were covered by the Act to Regulate Commerce. It was averred that, as the rate complained of was the one fixed in the rate sheets which the company had established and filed as required by the act, the State court was without jurisdiction to entertain the cause, and, even if such court had jurisdiction, it could not, without disregarding the act, grant relief upon the basis that the established rate was unreasonable when it had not been found to be so by the Interstate Commerce Commission. The averments of discrimination, undue preference, and greater charge for a shorter haul than for a longer haul were eliminated in the course of the trial. The judgment of the trial court was for the railway company; but the Court of Civil Appeals of Texas reached the conclusion that jurisdiction to grant relief existed in the State Court, and that to do so was not repugnant to the Act to Regulate Commerce.

The railway company obtained writ of error to the Supreme Court of the United States. The assigned errors were addressed exclusively to the operation of the Act to Regulate Commerce upon the jurisdiction of the courts below to entertain the controversy, and its power in any event to afford relief to the oil company, based upon the alleged unreasonableness of the rate under the circumstances disclosed. The Supreme Court reversed the judgment of the court below, and decided that the shipper cannot maintain such an action without reference to any previous action by the Interstate Commerce Commission, where such rate has been filed with the Commission and promulgated as provided by the act.

The court said that the independent right of an individual originally to maintain action to obtain pecuniary redress for violations of the act, conferred by section 9, must be confined to such wrongs as can, consistently with the context of the act, be redressed without previous action by the Commission, and that the provision of section 22, that nothing therein "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," cannot be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the statute.

In arriving at this conclusion the court said:

"If, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully restricted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal which the act created with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in the courts to grant relief on complaint of any shipper, upon a theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the

Commission in the premises. This must be because, if the power existed in both courts and the commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might not be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

A Circuit Court of the United States is without jurisdiction to enjoin the filing, publication, or enforcement by a railroad company of an interstate rate, on the ground that it is unreasonable or discriminatory, in advance of action thereon by the Interstate Commerce Commission, which is vested by the Act to Regulate Commerce with exclusive jurisdiction to determine such questions in the first instance.<sup>2</sup>

Congress did not contemplate such a result as the vesting of administrative authority in the courts in the absence of a clear intention that it was so intended. On the contrary, Congress has committed the power and imposed the duty to ascertain facts and determine what is reasonable in regard to rates and charges in view of such facts on the Commission.<sup>3</sup>

The effect of the Interstate Commerce Act as amended, as construed by the Supreme Court, is not merely to suspend the right of a shipper to maintain an action at law to recover damages resulting from an unreasonable rate or discriminating regulation or practice established by an interstate carrier while the rate or regulation remains in force, but to supersede such right entirely and to substitute therefor the remedy provided by the Act itself; and a shipper's independent right of action in a court is not revived by the abolition of the unlawful rate or regulation. A party claiming to be injured by a discriminatory rule for the distribution of coal cars by an interstate railroad cannot maintain in a court of law an action for the recovery of damages before the Interstate Commerce Commission has investigated the case, and determined by its report that the rule is or was discriminatory.<sup>4</sup>

There is no necessary connection between the subjects of reparation for unreasonable interstate freight rates charged and collected, and the fixing of new and just rates for the future, as will render void a reparation order of the Interstate Commerce Commission because of the error, if any, in omitting any concurrent provision fixing future rates.<sup>5</sup>

In *Southern Express Co. v. Long*<sup>6</sup> the Circuit Court of Appeals for the fifth circuit held that the allegations that the defendant company was carrying intrastate shipments of liquors at lower rates than those charged for interstate shipments from Jacksonville, Fla., to points in Georgia cannot be looked to as giving the bill equity because the district court had no jurisdiction to pass on the question of rates till the Interstate Commerce Commission had passed on them.

In *National Pole Co. v. Chicago & N. W. Ry. Co.*<sup>7</sup> decided by the Circuit Court of Appeals for the seventh circuit, it appeared that an interstate railroad company published a tariff on poles, providing that the poles might be dressed, sawed, concentrated in transit, and shipped from origin to concentration point and then to destination at through rates, which were less than the sum of the locals, but only on condition that the shipping bill issued at the point of origin specified the ultimate destination. This condition, having been submitted to the Interstate Commerce Commission on the complaint of other shippers,

was declared void and an order passed that it should be disregarded. The court held that the complainant was entitled to sue in the Federal court to recover the difference in rates paid on shipments of poles on which it was not accorded through rates because of the enforcement of such condition prior to its being declared void by the Commission without itself presenting its cause of action to the Commission and obtaining a reparation order on which to sue.

The power conferred upon the Interstate Commerce Commission by the statute to award damages to a shipper for violation of the Act by an interstate carrier is not limited to cases where damages arise from an excessive rate or charge, but extends to all cases where the shipper's common-law remedy is abrogated, and he is required to apply for redress in the first instance to the Commission, and such damages may be awarded on a finding of unjust and discriminatory regulations and practices in the distribution of coal cars in times of shortage.<sup>8</sup>

A consignee of property shipped in interstate commerce, cannot maintain an action in the courts to recover because of excessive freight charges exacted on such shipments, except for the enforcement of an award of damages made by the Commission, and a court is not given primary jurisdiction of such an action by the fact that the Commission, on complaint of shippers, to which proceeding plaintiff was not a party, has made a finding that the rate was excessive and awarded damages to such shippers.<sup>9</sup>

In an action against a telegraph company for an alleged negligence in the transmission of a telegram, the unreasonableness of a rule as to repetition of messages cannot be first considered in the district court but must be first raised before the Interstate Commerce Commission.<sup>10</sup>

Since the Interstate Commerce Commission is primarily charged with the duty of passing on the validity of a contract between a railroad company and a corporation operating a wharf for transferring freight from cars to vessels, the Federal courts would not take jurisdiction of a friendly suit by the corporation against the railroad company to recover compensation under its contract which involved no actual controversy and was brought merely to obtain a judgment which might be pleaded in defense of a disapproval of the railway company's allowance by the Commission.<sup>11</sup>

In *Geraty v. Atlantic C. L. Rd. Co.*<sup>12</sup> the court held that since, under the Act to Regulate Commerce, the Commission has the primary right to fix rates, the courts and a shipper as well are bound to treat rates charged by carriers in interstate commerce as lawful so long as they are acquiesced in by the Commission.

The acts of the Interstate Commerce Commission in the exercise of its administrative functions must, in order to be effective, strictly conform to those provisions and requirements of the statutes by which its authority is prescribed and defined, and this is especially true as to those provisions relating to rate-making and rate-changing.<sup>13</sup>

Under the specific and mandatory provisions of section 6 of the Interstate Commerce Act, which make it the indispensable duty of an interstate railroad carrier to file and publish schedules of all rates

and any rules or regulations which in any wise "change, affect, or determine any part or the aggregate of such aforesaid rates," and prohibit it from charging or receiving any greater or less or different compensation than that specified in such schedules, from extending to any shipper any privileges or facilities "except such as are specified in such tariffs," and from making any change in such rates except by plainly changing the schedules or filing or publishing new ones, after thirty days' notice, on the delivery of goods for carriage by a shipper, he has a contract right to the rates named in the schedule at the time on file and published, and to the benefit of all privileges and facilities specified therein which enter into such published rates.<sup>14</sup>

The Interstate Commerce Commission has no power to annul or change a rate, regulation or practice established by a railroad company by its filed and published schedules, except by a formal order made in conformity to section 15 of the Interstate Commerce Act.<sup>15</sup>

1. Texas & P. Ry. Co. v. Abilene Cotton Oil Co. (1907), 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. Rep. 350; reversing 38 Tex. Civ. App. 366, 85 S. W. 1052. The case of Texas & P. Ry. Co. v. Cisco Oil Mills (1907), 204 U. S. 449, 27 Sup. Ct. Rep. 358, 51 L. Ed. 562, was decided upon substantially the same grounds as the Abilene case, but the Supreme Court held further in the Cisco Oil Mills' case that interstate freight rates are established when a schedule thereof is filed by a carrier with the Commission and copies are furnished by a railway company to its freight offices, although such rates may not be "posted" as required by section 6 of the Act.
2. Columbus Iron & Steel Co. v. Kanawha & M. Ry. Co. (1910), 178 Fed. Rep. 261.
3. Louisville & N. Rd. Co. v. Interstate Commerce Commission (1910), 184 Fed. Rep. 118.
4. Morrisdale Coal Co. v. Pennsylvania Rd. Co. (1910), 183 Fed. Rep. 929, 106 C. C. A. 269.
5. Baer Bros. Mercantile Co. v. Denver & R. G. Rd. Co. (1914), 233 U. S. 479, 34 Sup. Ct. Rep. 641, 58 L. Ed. 1055. The history of the Baer Bros. case is as follows: Baer Bros. Mercantile Co. v. Missouri P. Ry. Co. (1908), 13 I. C. C. Rep. 329. Reparation awarded on account of unreasonable rates collected for the transportation of beer from Pueblo, Colo., to Leadville, Colo., originating in St. Louis, Mo. Baer Bros. Mercantile Co. v. Missouri P. Ry. Co. (C. C. D. Col.) (not reported.) Action brought to enforce order of the Commission on award of reparation. At the trial the court directed a verdict and rendered judgment in favor of plaintiff. Denver & R. G. Rd. Co. v. Baer Bros. Mercantile Co. (1911), 187 Fed. Rep. 485. Lower court reversed. Order prescribing maximum rate for future should have been entered as condition precedent to an award of reparation. Baer Bros. Mercantile Co. v. Denver & R. G. Rd. Co. (1914), 233 U. S. 479, *supra*. Circuit Court of Appeals reversed and decision of Circuit Court affirmed.
6. Southern Express Co. v. Long (1913), 202 Fed. Rep. 462, 120 C. C. A. 568.
7. National Pole Co. v. Chicago & N. W. Ry. Co. (1914), 211 Fed. Rep. 65, 127 C. C. A. 561, reversing National Pole Co. v. Chicago & N. W. Ry. Co. (1912), 200 Fed. Rep. 185.
8. Jacoby v. Pennsylvania Rd. Co. (1912), 200 Fed. Rep. 989.
9. Franklin v. Philadelphia & R. Ry. Co. (1913), 203 Fed. Rep. 134.
10. Williams v. Western Union Telegraph Co. (1913), 203 Fed. Rep. 140.
11. Southern Cotton Oil Co. v. Central of Georgia Ry. Co. (1913), 204 Fed. Rep. 476; affirming, Southern Cotton Oil Co. v. Central of Georgia Ry. Co. (1915), 228 Fed. Rep. 335.
12. Geraty v. Atlantic C. L. Rd. Co. (1914), 211 Fed. Rep. 227; Baltimore & O. Rd. Co. v. Carnegie Steel Co. (1918), 251 Fed. Rep. 682.
13. American Sugar Refining Co. v. Delaware L. & W. Ry. Co. (1913), 207 Fed. Rep. 733, 125 C. C. A. 251; reversing, American Sugar Refining Co. v. Delaware L. & W. Ry. Co. (1912), 200 Fed. Rep. 652.
14. *Ibid.*
15. *Ibid.*

#### 613-J. FINALITY OF CONCLUSIONS OF COMMISSION ON QUESTIONS OF FACT.

The courts cannot, under the guise of exerting judicial power usurp merely administrative functions by setting aside an order of the Interstate Commerce Commission within the scope of the power delegated

to such Commission upon the ground that such power was unwisely or inexpeditiously exercised.<sup>1</sup>

Evidence cannot be weighed by the Supreme Court, as a matter of first impression, in a suit to enforce an order of the Interstate Commerce Commission, for the purpose of ascertaining whether it establishes such substantial and material competition as justified a carrier in concluding that dissimilarity of circumstance and condition was brought about.<sup>2</sup>

The findings of the Interstate Commerce Commission that certain through rates are unreasonable in themselves carry with them a presumption of correctness.<sup>3</sup>

In *Advances in Rates—Western Case*<sup>4</sup> the Commission stated: "It is doubtless true that in its control over the charges which our railroads may make this Commission exercises a power so extensive as to justify the broadest consideration of the economic and financial effects of its orders. By its decisions in the *Abilene Cotton Oil Case*, 204 U. S. 426, and in the *Illinois Central case*, 215 U. S. 452, the Supreme Court has erected this Commission into what has been termed 'an economic court,' or to give it a more commonplace definition, but one perhaps of stricter legal analogy, a select jury to pass upon the reasonableness and justness of railroad rates, rules and practices. Within broad lines of discretion the courts regard the conclusions of the Commission on questions of fact as final. There is an appeal upon questions of law by the carriers to the courts, but unless a constitutional guaranty is violated the order of this Commission is final, provided, of course, the Commission does not overstep the jurisdictional limits placed upon it by the statute. And as to the shipper this tribunal is his one and only resort against injustice."

1. Interstate Commerce Commission v. Illinois C. Rd. Co. (1910), 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. Rep. 155.
2. Louisville & N. Rd. Co. v. Behlmer (1900), 175 U. S. 649, 44 L. Ed. 309, 20 Sup. Ct. Rep. 209.
3. Interstate Commerce Commission v. Chicago, R. I. & P. Ry. Co. (1910), 218 U. S. 88, 54 L. Ed. 946, 30 Sup. Ct. Rep. 651; Interstate Commerce Commission v. Chicago E. & Q. Rd. Co. (1910), 54 L. Ed. 959, 218 U. S. 113, 30 Sup. Ct. Rep. 660.

The history of the Denver Rate case is as follows: *Kindel v. New York, N. H. & H. R. Rd. Co.* (1909), 15 I. C. C. Rep. 555. Carriers ordered to reduce certain rates from the Missouri River, Chicago, Ill. and St. Louis, Mo. to Denver, Colo. and from Denver to Utah common points on the ground that the rates are unreasonable and unduly prejudicial to Denver. *Chicago, B. & Q. Rd. Co. v. Interstate Commerce Commission* (1909), 171 Fed. Rep. 680. Commission's order held invalid on the ground that it arbitrarily created trade zones. *Interstate Commerce Commission v. Chicago, B. & Q. Rd. Co.* (1911), 218 U. S. 113, supra. Commission's order held to be valid in all respects. It did not, it was held, arbitrarily create trade zones.

4. *Advances in Rates—Western Case*: In Re Investigation of Advances in Rates by Carriers in Western Trunk Line, Trans-Missouri, and Illinois Freight Committee Territories (1911), 20 I. C. C. Rep. 307, 317.

#### 613-K. POWER OF COMMISSION TO ESTABLISH JOINT RATES AND DIVISIONS THEREOF.

Section 15 (3) of the Interstate Commerce Act (*as amended June 29, 1906, June 18, 1910 and February 28, 1920*) reads as follows:

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or

the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line.

The law does not require the Commission in all cases where no through routes and joint rates exist to establish them, but only empowers it to do so in proper cases with the manifest intent of giving effect to the general purposes of the Act to Regulate Commerce by securing reasonable facilities to the public and preventing unreasonable and unjust rates, practices and discriminations, and in the exercise of this authority the Commission is bound by the same considerations of justice and fairness as it is in the exercise of the rate-making power in other respects. Where neither the interest of the public, nor the ends of justice as between parties directly interested will be prompted by the establishment of through routes and joint rates and divisions thereof, a proper case for the exercise of the authority invoked has not been shown.<sup>1</sup>

Originally the statute contained no provision permitting the establishment of a joint rate between two carriers by public authority, and the courts held that, notwithstanding the provisions of the third section, railroads were free to select their connections and to make such arrangements for the handling of through business with those connections as they saw fit. To make such arrangements with one railroad and exclude another was not an undue discrimination. Later the act was amended so as to give this Commission authority to establish a through route between points where no "reasonable and satisfactory route" already existed. If a railroad has provided one satisfactory route for the transaction of business either all the way by its own line or by its own line in connection with some other line, this Commission had no authority to establish an additional route. The manifest intent of this provision was to permit a railroad to handle by such route as it saw fit traffic which it could obtain, provided it offered a satisfactory route and therefore protected the public interest. Still later this provision for joint rates was changed so as to allow the establishment between two points of an indefinite number of routes, but it was now provided that in the establishing of a through route no railroad should be required to haul traffic over less than the entire length of its line unless such route was unduly circuitous. The purpose of Congress here again is plain. If a railroad has traffic in its possession, it shall be allowed to handle it by its own line as far as it can unless the public interest will suffer thereby.<sup>2</sup>

It is competent for the Commission and the courts to deal with the through rate over connecting lines, no matter how such rate may be made up as between the carriers.<sup>3</sup>

Where the division of a through rate received by an initial carrier is increased, without a corresponding decrease in the division received by connecting carrier, the result being that the through rate is made unreasonable, the Commission may restrain the enforcement of such increase.<sup>4</sup>

While the Commission cannot compel the reduction of a joint through rate unless all the carriers uniting in the rate have been made

parties to the proceeding, it may order the initial carrier to bill the merchandise in a particular class, although the connecting carrier have not been joined as parties.<sup>5</sup>

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1. *Loup Creek Colliery Co. v. Virginia Ry. Co.* (1907), 12 I. C. C. Rep. 471; *Enterprise Transportation Co. v. Pennsylvania Rd. Co.* (1907), 12 I. C. C. Rep. 326.
  2. *Waverly Oil Works Co. v. Pennsylvania Rd. Co.* (1913), 28 I. C. C. Rep. 621, 629, et seq.
  3. *Illinois C. Rd. Co. v. Interstate Commerce Commission* (1907), 206 U. S. 441, 27 Sup. Ct. Rep. 700, 51 L. Ed. 1128.
  4. *Ibid.*
  5. *Hurlbut v. Lake Shore & M. S. Ry. Co.* (1888), 2 I. C. C. Rep. 122, 2 I. C. Rep. 81.

#### 613-L. COMMISSION MAY NOT ESTABLISH THROUGH RATES IN CONNECTION WITH STREET-ELECTRIC-PASSENGER RAILWAYS.

Section 15 (3) of the Interstate Commerce Act (*as amended June 18, 1910*) provides that the Commission shall not establish any through route, classification, or practice, or any rate, fare, or charge, between street-electric-passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character.

#### 613-M. POWER OF COMMISSION TO ESTABLISH JOINT RATES BETWEEN STEAM RAILWAYS AND INTERURBAN-ELECTRIC RAILWAYS.

In *Chicago, O. & P. Ry. Co. v. Chicago & N. W. Ry. Co.*<sup>1</sup> the Commission stated: "The defendants challenge our jurisdiction to enter the order prayed for on the ground that because of the limitations in franchises which, as hereinbefore explained, prevent the movement of carload freight over its entire line, the complainant is not engaged in the general business of transporting freight within the meaning of section 15 of the act. The case of *Omaha & Council Bluffs St. Ry. Co. v. Interstate Commerce Commission*, 230 U. S. 324, is cited and relied upon. That company did not hold itself out to carry freight of any kind and has never engaged in the transportation of freight. It was not constructed for the purpose of carrying freight, and under the facts of the case the Supreme Court held that it was not engaged in the general business of transporting freight as contemplated by the act. It is obvious that the case is not controlling here. The complainant is engaged in transporting carload and less-than-carload freight and has joint rates with certain steam roads for both intrastate and interstate shipments. Our authority upon a proper showing to require the establishment by steam railroads of through routes and joint rates with interurban electric railroads engaged in the interstate transportation of freight has long been settled. *Cedar Rapids & Iowa City Ry. Co. v. C. & N. W. Ry. Co.*, 13 I. C. C. 250; *Chicago & Milwaukee Electric R. R. Co. v. I. C. R. R. Co.*, 13 I. C. C. 20; *St. Louis, Springfield & Peoria R. R. v. P. & P. U. Ry. Co.*, 26 I. C. C. 226. It is the needs of the shipping and receiving public that the act was intended primarily to serve; and if a public necessity therefor is shown, our right in the case to require the establishment of the through routes and joint rates prayed for seems to be clear. The details with respect to equipment and facilities for the interchange of traffic devolve upon the carriers that are parties to the routes and rates after they are established.

*Flour City S. S. Co. v. Lehigh V. R. R. Co., 24 I. C. C. 170; St. Louis, Springfield & Peoria R. R. v. P. & P. U. Ry. Co., supra.*"

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1. Chicago, O. & P. Ry. Co. v. Chicago & N. W. Ry. Co. (1915), 33 I. C. C. Rep. 573, 575.

613-N. COMMISSION NO AUTHORITY TO ESTABLISH JOINT THROUGH RATES WITH INDEPENDENT WATER CARRIERS.

Section 15 (3) of the Interstate Commerce Act (*as amended June 18, 1910*), provides that the Commission shall not have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water, and that any transportation by water affected by the Act shall be subject to the laws and regulations applicable to transportation by water.

In *Chamber of Commerce of State of New York v. New York C. & H. R. Rd. Co.*<sup>1</sup> the Commission said: "We have no jurisdiction of the ocean rates and must deal with this question as though the ports were destinations instead of gateways. This does not mean that the carriers may not take into consideration the previous or further transportation of the traffic on the ocean and thus differentiate it, reasonably, from domestic traffic, but the rates to and from the ports must be reasonable, must be published as independent from ocean transportation, and are subject to all of the provisions of the act. *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.*, 13 I. C. C., 266; *Armour Packing Co. v. U. S.* 209 U. S. 56."

See "Water carriers," Section 320, ante; "Independent water carriers—Inland—Ocean," Section 406, ante, and "Water Carriers—Panama Canal Act," Chapter 50, post.

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1. *Chamber of Commerce of State of New York v. New York C. & H. R. Rd. Co.* (1912), 24 I. C. C. Rep. 55, 74; affirmed, *Louisiana Sugar Planters' Assn. v. Illinois C. Rd. Co.* (1914), 31 I. C. C. Rep. 311, 319.

613-O. POWER OF COMMISSION TO ESTABLISH JOINT THROUGH RATES WITH BELT RAILROAD.

In *St. Louis, Springfield & P. Rd. Co. v. Peoria & P. U. Ry. Co.*<sup>1</sup> Mr. Commissioner Prouty, in a concurring opinion, stated: "The Peoria & Pekin Union is properly a belt railroad. It was constructed for the express purpose of giving main-line railroads access to the various industries in and about Peoria. It has no main line, and it is entirely immaterial to it by what connecting railroad the main-line haul is performed.

"In my opinion the Commission may properly establish through rates to and from industries upon a terminal railroad of this character. Such a road obtains the full use of its property when it is allowed fair compensation for the handling of business from the junction point with the main line to the industry or team track. It has no terminals, as that word is used in the third section, which are entitled to protection.

"I somewhat doubt whether in this case there is, properly speaking, a physical connection between the lines of the complainants and the defendant, since, while it is physically possible to transfer a car

from one railroad to the other, still that cannot be done in a practical way, and the connection, such as it is, seems to have been made without the knowledge or consent of the defendant.

"It does appear, however, that there was formerly an entirely practical physical connection at another point and that this could be readily restored. Under these circumstances we may, perhaps, order the through service, leaving the parties to provide the necessary connection. At any rate it is clear to me that the defendant should be required to handle the business of the complainant upon fair terms, and this Commission should at least attempt to compel this. If we mistake in the making of our order the defendant has ample protection in the courts, while if we err by denying the petition of the complainants it is not clear that this error can be corrected."

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1. St. Louis, S. & P. Rd. Co. v. Peoria & P. U. Ry. Co. (1913), 26 I. C. C. Rep. 226, 238, et seq.

#### 613-P. COMMISSION NO POWER TO ESTABLISH JOINT THROUGH RATES BETWEEN POINTS IN THE UNITED STATES AND POINTS IN ADJACENT FOREIGN COUNTRIES.

In *Black Horse Tobacco Co. v. Illinois C. Rd. Co.*,<sup>1</sup> the Commission stated: "The Act to Regulate Commerce confers jurisdiction over common carriers engaged in transportation of persons or property from any place in the United States to an adjacent foreign country. That Act further provides that 'All charges made for any service rendered or to be rendered, in the transportation of passengers or property, as aforesaid,' shall be just and reasonable. These American carriers are therefore under requirement to impose reasonable charges for the transportation before us.

"If the American line saw fit, it might doubtless name a rate to the Mexican border, and in that event we could deal only with the service up to the Mexican line. Instead of adopting that course the American carriers, in connection with the Mexican carrier, established a joint charge for the entire service from the point in the United States to the point in Mexico, and gave no information as to the part of that charge which would accrue to the American roads. This does not relieve the American carriers from obligation to impose a reasonable charge for their service; it does make it impossible for the Commission to determine the reasonableness of that charge, except by examining the entire through rate.

"Clearly, we have no authority to establish a rate of transportation in Mexico; nor to order the maintenance of a rate for the future from a point in the United States to a point in Mexico; but we may require the American carriers to cease and desist from continuing to apply a joint through rate or any rule, regulation, or practice in connection with that joint through rate, and we may, where such rate has been voluntarily maintained, inquire whether it has been reasonable, and if found unreasonable, award damages in that behalf."

The Commission has no more power to require the issuance of through bills of lading to foreign destinations than it has to establish through routes or rates to such destinations, but it does have power

to remove unjust discriminations and may require the discontinuance of practices which create such discriminations.<sup>2</sup>

In *Rates on High Explosives to Grand Trunk Railway System Stations*<sup>3</sup> the Commission said: "A sharp issue is made on behalf of the Grand Trunk Railway of Canada, the Canadian member of the Grand Trunk System, as to the legal power of this Commission to require it to continue to participate in this traffic under the present joint rates. Its rails lie within the Dominion of Canada, and its corporate life and operation as a railroad are carried on under the authority of the laws of Canada. It is contended, therefore, that this Commission has no authority to require the Grand Trunk Railway of Canada without its consent either to establish or to continue to maintain joint arrangements with our domestic carriers for the through movement of any traffic, and especially for the carriage of dynamite and other high explosives. The Canadian Commission in dealing with movements from the United States into Canada has recently held that the only practicable course for that Commission was not to interfere with the rates published by carriers within the jurisdiction of this Commission, and that upon a parity of reasoning our jurisdiction should be similarly limited with respect to rates published by Canadian carriers for movements into the United States. Some such understanding as between the two regulating bodies is desirable, and in *International Paper Co. v. D. & H. Co.*, 33 I. C. C. 270, as well as in other cases, this Commission has announced the same principle as a reasonable working basis in dealing with such traffic. It is there said (p. 274):

"The Canadian board has held that it should not consider the reasonableness of joint rates from points in the United States to points in Canada, published by United States carriers and concurred in by Canadian carriers. It has taken the position that this Commission, having jurisdiction over the carriers primarily responsible for the making and publication of such rates, is the proper tribunal to consider the reasonableness thereof. *Continental Prairie & Winnipeg Oil Co. v. C. P. Ry. Co.*, 13 Can. Ry. Cas. 156; *C. N. Ry. Co. v G. T. Ry. Co.*, 10 Can. Ry. Cas. 139.

"We added that, in view of the careful investigation that had been made by the Canadian Commission, we would not require the carriers subject to our jurisdiction to withdraw their concurrences in the rates there under consideration, namely, from points in the Dominion of Canada to points in the state of New York.

"In the case before us here, however, we are called upon to consider the rights of shippers with respect to rates for the movement of traffic, not to or from points in Canada, but from a point in the United States through Canada to another point in the United States. While our powers respecting the through charges on such traffic seem not to have been considered in any previous formal proceeding before us, we had been under the impression that section 1 of the act imposes upon all the carriers participating in such traffic some control with respect to their charges for the service and particularly when the charges take the form of joint through rates. Such joint rates obviously are not under the control of the Canadian Commission, and, under the principle referred to in the cases last cited, seem necessarily to fall within our jurisdiction.

"It is doubtless true that this Commission could not require a Canadian line not engaged in such traffic to accept shipments against its will or in violation of any Canadian policy or other lawful regula-

tion. But the Grand Trunk Railway of Canada does not propose to retire from traffic between domestic points in this country that may move over its rails. It does not propose even to retire from the traffic in high explosives between such points; on the contrary, as heretofore stated, we gather from the record that it proposes to continue to participate in the movement of high explosives from points in the United States to other points in the United States. It will continue to accept through billing on such traffic, so far as this record advises us, even if the joint through rates are permitted to be canceled; but the policy announced by it is simply that it no longer desires to maintain joint rates on such commodities and hereafter will apply its materially higher local rates on all such through shipments. While proposing to continue in general traffic between our domestic points and in the movement of high explosives, the Grand Trunk Railway of Canada nevertheless denies that this Commission has any power to review or control its course in the premises with respect to the matter of its rates for the through movement.

"There may be that limitation upon our powers respecting the rates and practices of carriers moving traffic between domestic points over intermediate Canadian rails. But obviously no definite ruling upon questions involving a possible conflict of authority as between the rate-regulating bodies of this country and of Canada should be announced in such a case as this and upon such a record and without the most ample consideration of the matter in all its phases. We shall therefore express no final conclusions at this time respecting the questions of our jurisdiction and the application of our act under the terms of section 1 to the rates and practises of the carriers moving traffic between domestic points over intermediate Canadian rails. The domestic member of the Grand Trunk system is clearly subject to all the provisions of our act, both in the matter of its rates and routes, and under our law, may inaugurate no such policy with respect to this particular traffic that has been announced by the Canadian member of that system. The points in Michigan on the rails of the domestic member of the system may be reached over reasonably convenient routes, lying wholly within the United States; and a number of the carriers operating south of the lakes in our own territory are parties to the tariffs in question. The protestants are entitled to through routes and reasonable joint rates on this traffic to such destinations, and we shall expect the respondents to withdraw the tariffs under suspension until such routes have been established over the rails of our own lines at the through rates now in effect in connection with the Grand Trunk system. In such rates and routes to local points on its rails the Grand Trunk Western Railway will be expected to join."

The extent of the Commission's jurisdiction in connection with the transportation to or from an adjacent foreign country is over that portion of the transportation within the confines of the United States. The Commission cannot prescribe joint through rates from points in an adjacent or nonadjacent foreign country to points in the United States, but it can control the charges for that portion of the service rendered by the carriers in the United States.<sup>4</sup>

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1. Black Horse Tobacco Co. v. Illinois C. Rd. Co. (1910), 17 I. C. C. Rep. 588.  
2. Arkansas Pass Channel & Dock Co. v. Galveston, H. & S. A. Ry. Co. (1913), 27 I. C. C. Rep. 403, 415.

3. Rates on High Explosives to Grand Trunk Railway System Stations (1915), 33 I. C. C. Rep. 567, 568, et seq; Carey Mfg. Co. v. Grand Trunk W. Ry. Co. (1915), 36 I. C. C. Rep. 203.
4. Carlowitz & Co. v. Canadian P. Ry. Co. (1917), 46 I. C. C. Rep. 290, 292; citing, International Paper Co. v. Delaware & H. Co. (1915), 33 I. C. C. Rep. 270 and Carey Mfg. Co. v. Grand Trunk W. Ry. Co. (1915), 36 I. C. C. Rep. 203; Good v. Great N. Ry. Co. (1918), 48 I. C. C. Rep. 435.

**613-Q. POWER OF COMMISSION TO ESTABLISH JOINT THROUGH RATES IS DISCRETIONARY WITH THAT BODY AND NOT REVIEWABLE BY THE COURTS.**

The power conferred on the Interstate Commerce Commission by section 15 of the Act to establish joint rates, is discretionary, and its refusal to establish such a rate is within its discretion and not reviewable by the court.<sup>1</sup>

1. Crane Iron Works v. United States (1912), 209 Fed. Rep. 238; Crane Rd. Co. v. Philadelphia & R. Ry. Co. (1909), 15 I. C. C. Rep. 248. Held, That complainant is not entitled to the establishment of through routes and joint rates with defendant on the ground, among others, that it is not shown that the complainant is a common carrier. Complaint dismissed. Crane Iron Works v. Central R. R. of N. J. (1910), 17 I. C. C. Rep. 514. Complainant seeking establishment of through routes and joint rates in connection with the Crane Rd. Co. (an industrial road performing a plant facility service), dismissed. Crane Iron Works v. Interstate Commerce Commission (Sup. Ct. D. C.) (1911) not reported. Petition for mandamus to compel Commission to grant relief asked. Suit discontinued upon motion of plaintiff's attorney. Crane Iron Works v. United States (1912), 209 Fed. Rep. 238. Commerce Court held Commission's order of dismissal to be valid on the ground that Commission is vested, by section 15, with discretion in the matter of establishing joint through route and that the refusal of the Commission to establish such a route in this case was a lawful and proper exercise of that discretion. Crane Iron Works v. United States (Commerce Court No. 55) (1912). Following Procter & Gamble Co. v. United States, (1912), 225 U. S. 282, 56 L. Ed. 1091, 32 Sup. Ct. Rep. 76, to the effect that a denial of relief by the Commission is not an order of which the Commerce Court had jurisdiction, case dismissed for want of jurisdiction.

**613-R. COMMISSION MAY ESTABLISH JOINT THROUGH RATE IF DISCRIMINATION IS FOUND TO EXIST.**

In *St. Louis S. W. Ry. Co. v. United States*,<sup>1</sup> the petitioners operate railroads extending into the yellow pine lumber district lying west of the Mississippi and south of the Rock Island line from Memphis to Little Rock and make a blanket rate on lumber from such territory to Cairo, Ill., of 16 cents per 100 pounds, and to Paducah, Ky., about 40 miles east of Cairo on the Ohio, of 22 cents. The two cities are competitors in the manufacture and sale of lumber and its products. None of petitioners reach Paducah with their own lines, but two of them reach Cairo by lines crossing the Mississippi a few miles above, and the Paducah rate is based on the rate to Cairo with the local rate from there to Paducah added. All of petitioners can reach both Cairo and Paducah through connecting lines by way of Memphis by a shorter route, that to Paducah being shorter than that to Cairo, but in order to do so some of them, especially those whose lines reach Cairo, would have a much shorter haul on their own lines. The rate to Cairo is reasonable. Held, That a finding by the Interstate Commerce Commission that the rate to Paducah is unjustly discriminatory against that point and in favor of Cairo was sustained by the facts, and that an order based thereon requiring petitioners and their connecting lines to establish through routes and joint rates to Paducah not higher than those now charged to Cairo, by way of Memphis or Cairo in the alternative, was within the powers of the Commission; that under the

Interstate Commerce Act, which authorized the Interstate Commerce Commission to correct unjust practices, and also provides that the Commission may, after hearing, with or without a complaint, establish through routes and joint rates does not depend upon the finding that all of the carriers affected have been guilty of unjust discrimination, but such power may be exercised if discrimination in fact existed; that an order of the Interstate Commission requiring the establishment of a through route and joint rates is not invalid, as beyond its powers, because it compels some of the carriers affected, which do not reach the terminal point with their own lines, to accept a shorter haul, or in the alternative to make a reduction in their rate to another connecting point which in itself is reasonable.

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1. St. Louis S. W. Ry. Co. v. United States (1916), 234 Fed. Rep. 668.

**613-S. COMMISSION MAY ORDER MAINTENANCE OF JOINT THROUGH RATE WHEN ITS CANCELLATION WILL RESULT IN HIGHER CHARGE BASED UPON COMBINATION OF LOCALS.**

Where the withdrawal of the through rates, leaving in operation the lowest combination of local rates, would increase the charges on a particular commodity moving over that route, the carriers were under the burden of justifying their course and of showing that the resulting charges would be just and reasonable. Where, therefore, the Commission finds the rates in excess of those now in effect would be unjust and unreasonable, it will require the defendant carriers to maintain the present through routes and joint rates between the points in question.<sup>1</sup>

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1. In the Matter of the Investigation and Suspension of Advances in Rates by Carriers for the Transportation of Soft Coal from Illinois Mines to Stations on the St. Louis & Hannibal Railway (1912), 23 I. C. C. Rep. 518. See Pine Bluff Traffic Bureau v. Louisville & N. Rd. Co. (1915), 37 I. C. C. Rep. 218.

**613-T. POWER OF COMMISSION TO RELIEVE FROM THE OPERATION OF THE LONG-AND-SHORT-HAUL CLAUSE.**

See "*Fourth Section of the Interstate Commerce Act—Long-and-Short-Haul Clause—Fourth-Section Applications*," Chapter 7, post.

**613-U. COMMISSION MAY MAKE ORDER PRESCRIBING THE SAME RATE FOR**

**SIMILAR SERVICE TO OTHER SHIPPERS.**

It is one of the primary purposes of the Interstate Commerce Law to remove discriminations in rates; and under the broad power conferred on the Interstate Commerce Commission "to execute and enforce the provisions of this Act" and "to make an order that the carrier shall cease and desist from such violation to the extent to which the Commission find the same to exist," where it has found that discrimination exists against a shipper or commodity, it may prescribe a reasonable rate, and that the charge shall be the same as that for a similar service to other shippers or on another similar commodity, instead of fixing an absolute maximum rate, which would enable the carrier to continue the discrimination by reducing the rate to the shippers or on the other commodity.<sup>1</sup>

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1. New York C. & H. H. Rd. Co. v. Interstate Commerce Commission (1909), 168 Fed. Rep. 131.

**613-V. COMMISSION NO POWER TO ADVANCE RATES TO TEMPORARILY IMPROVE BUSINESS CONDITIONS.**

*In Advance in Rates—Eastern Case,*<sup>1</sup> the Commission stated: “This Commission must stand for the entire public, including the rail-ways. It cannot accede to the mere wish of any class; it must recognize the just demands of all classes; and it must have in mind those who do not appear as well as those who are presented before it.

“A somewhat different question is presented by those who urge that to permit these advances in freight rates would immediately stimulate all kinds of business. The assumption appears to be that busi-ness conditions are unsatisfactory, and that some special effort is necessary to restore satisfactory conditions.

“Next to agriculture our railroads are the greatest single industry. In their ordinary maintenance and operation great numbers of labor-ers and vast quantities of supplies are used. Railroad extension would mean the employment of additional laborers and the purchase of addi-tional material and equipment. Now, the thought seems to be that to permit these advances would induce larger expenditures in the main-tenance of our present roads, and would lead to extensions and im-provements which would in turn employ additional labor, put into cir-culation additional money, and thereby improve general business con-ditions.

“So far as such expenditures are legitimate, they ought to be en-couraged. Our railroads should be kept in a high state of efficiency, and railroad charges should be sufficient to permit this. Necessary ex-tensions and improvements should be made, and the treatment of our railroads by the public should be such as would inspire that con-fidence in the investing public necessary to obtain the funds for such ad-ditions. But to the extent that an artificial impetus might be given to railroad building and kindred industries, the effect would be in the end baneful, even though the temporary result might seem beneficial.

“It appeared upon this hearing that the freight tonnage of 1907 was larger than ever before, that this led to an unprecedented demand for railway equipment and railway supplies and that factories were then provided to meet this demand, which cannot now be fully utilized. It was admitted by the representatives of supply houses that the pro-ductive capacity for railway equipment and supplies much exceeded that required for the ordinary upkeep of our railways, and that these facilities could only be utilized to their full and most profitable extent in case additional railroads were constructed and additional equip-ment required. We ought not to impose upon the public rates, other-wise unreasonable, for the mere purpose of temporarily providing busi-ness for these factories, even though the effect might be to stim-u-late, for the time being, other kinds of industry.

“Just and reasonable rates should be allowed, but we should not be justified in permanently imposing rates unduly high in order that busi-ness conditions might be temporarily improved.”

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1. *Advances in Rates—Eastern Case: In Re Investigation of Advances in Rates by Carriers in Official Classification Territory* (1911), 20 I. C. C. Rep. 243, 250, et seq.

**613-W. POWER OF COMMISSION TO CONSIDER EFFECT ON THE BUSINESS OF AN INDUSTRY IN ADVANCING RATES.**

The Interstate Commerce Commission cannot be said to have ordered a reduction in the rates on lumber because of the effect upon the lumber industry of the carriers' action in advancing the rates, where, although the Commission considered that subject, its opinion, taken as a whole, affirmatively shows that it confined itself to the exercise of its statutory power to condemn unjust and unreasonable rates and fix reasonable ones.<sup>1</sup>

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1. Interstate Commerce Commission v. Union P. Rd. Co. (1912), 222 U. S. 541, 56 L. Ed. 308, 32 Sup. Ct. Rep. 108.

**613-X. DETERMINATION OF NATURE OF COMMODITY IS A JUDICIAL QUESTION.**

What rate shall be established for the hauling of a specified commodity is an administrative or legal question, and therefore properly determined by the Commission; what a given commodity is is a judicial question, over which, obviously, the Commission has no jurisdiction.<sup>1</sup>

In *Lakewood Engineering Co. v. New York C. Rd. Co.*<sup>2</sup> the Circuit Court of Appeals, sixth circuit, per Mr. Circuit Judge Denison, stated: "A duly published tariff, in many respects, approximates a statute. Parties have no power to vary it by their express contract, much less merely by those implications arising from their conduct. Severe penalties are provided for its infraction or for any differential treatment of different shippers; and it cannot be permitted that the conduct of the railroad, by different agents at different times, should cause a tariff to mean one thing for one shipper and a different thing for another. We have no occasion to deny that there may be cases of ambiguity where a general or universal course of conduct may support one or the other construction; but in this case we think it the duty of the court to ascertain and declare the true respective meanings of these two tariffs as applied to the article here shipped."

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1. In Re Independent Sewer Pipe Co. (1918), 248 Fed. Rep. 547, 554.  
2. Lakewood Engineering Co. v. New York C. Rd. Co. (1919), 259 Fed. Rep. 61, 64, 170 C. C. A. 121. Case dismissed. Lakewood Engineering Co. v. New York C. Rd. Co. (1920), 254 U. S. 661, 65 L. Ed. 126, 41 Sup. Ct. Rep. 60.

**613-Y. JURISDICTION OF COMMISSION OVER RAILWAY-MAIL PAY.**

Since 1873 rates for mail transportation have been prescribed by Congress. On July 28, 1916, Congress enacted a law under which the control of rates, charges, and the methods for the determination of the same covering railway mail was transferred to the Interstate Commerce Commission.<sup>1</sup>

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1. Railway-Mail-Service Pay Act (July 28, 1916), 39 Stat. L. 425. For a history of railway-mail pay legislation, see Proceeding No. 9200 before Interstate Commerce Commission, Railway-Mail Pay (1919), 56 I. C. C. Rep. 1.

**613-Z. COMMISSION NO POWER TO FIX RATES EXCEPT UPON TRAFFIC CONSIDERATIONS.**

In *Atchison, T. & S. F. Ry. Co. v. Interstate Commerce Commission*<sup>1</sup> the Commerce Court stated: "Authority granted it (the Commiss-

sion) under section 15 of the Act to Regulate Commerce to prescribe reasonable rates when it shall be of the opinion that the rates fixed by the carrier are unreasonable does not confer absolute or arbitrary power to act on any consideration which the Commission may deem best for the public, the shipper and the carrier. Its order must be based on transportation considerations. While it may give weight to all factors bearing either on the cost of the value of the transportation services, it must disregard as well the demand of the shipper for protection from legitimate competition, domestic or foreign, for unlimited markets, or for the enforcement of equitable estoppels arising from a justifiable expectation that past rates will be maintained, as the demand of the carrier for the maximum rate under which the traffic will move freely."

It is one thing for carriers to voluntarily reduce rates not excessive for the service performed, solely to meet competitive conditions, but it is quite a different thing for the Commission to undertake to compel them to make such reductions regardless of the transportation conditions.<sup>2</sup>

In *Advance in Rates—Eastern Case*,<sup>3</sup> the Commission stated: "The railroad rates of this country have not been constructed as a rule upon any scientific basis, and this is especially true of the interstate rates. The traffic officials who have established these rates have generally done so without any special inquiry as to the total amount of revenue which ought to be produced or as to the part of that burden which a particular commodity ought to bear. This Commission is called upon to deal with rates as they exist, and in so doing we ordinarily reconsider them, not from the revenue standpoint but rather from the commercial and traffic standpoint. At the same time it is now the settled law that there is a limit below which the revenue of railways cannot be reduced by public authority, and if there were no such constitutional limitation it would nevertheless behoove every regulating body to permit the existence of such rates, when possible, as will yield just earnings to the railways. The question of revenue is therefore fundamental and ever-present in all considerations as to the reasonableness of railroad rates, although it may not be and seldom is, where single rates are presented, the controlling question.

"While the authority of this Commission only extends to the passing upon the reasonableness of the rate presented for its consideration, it is not confined to single rates."

1. *Atchison, T. & S. F. Ry. Co. v. Interstate Commerce Commission* (1911), 190 Fed. Rep. 591, 564. This is known as the Lemon Case, the history of which is as follows: *Arlington Heights Fruit Co. v. Southern P. Co.* (1909), 175 Fed. Rep. 141. Pending determination by the Commission of the reasonableness of such rate, defendant carriers were enjoined from putting into effect a proposed advanced rate on lemons from California to the East. *Southern P. Co. v. Arlington Heights Fruit Co.* (1911), 191 Fed. Rep. 101, 11 I. C. C. A. 581. Lower court reversed on the ground that the suit was not brought in the proper district. *Arlington Heights Fruit Exchange v. Southern P. Co.* (1910), 19 I. C. C. Rep. 148. Carriers ordered to reduce the advanced rate to the basis of the former rate on the ground that the advanced rate is unreasonable. *Atchison, T. & S. F. Ry. Co. v. Interstate Commerce Commission* (1910), 182 Fed. Rep. 189. Pending determination of case by the United States Commerce Court, enforcement of Commission's order enjoined. Case transferred to Commerce Court. *Atchison, T. & S. F. Ry. Co. v. Interstate Commerce Commission* (1911), 190 Fed. Rep. 591; 1 I. C. C. Rep. 83. Commission's order held invalid on the ground that it was based primarily on the assumed authority to protect the lemon industry in this country against foreign competition. The Commission, it was held, is vested with no such authority. *Arlington Heights Fruit Exchange v. Southern P. Co.* (1911), 22 I. C. C. Rep. 149. Disclaiming any authority to attempt to exer-

- cise an authority to reduce rates to protect the domestic industry against foreign competition, the Commission again ordered the carriers to reduce the advanced rate to the basis of the former rate on the ground that the advanced rate is unreasonable. Atchison, T. & S. F. Ry. Co. v. United States (1913), 203 Fed. Rep. 56. Commission's order held to be valid. Atchison, T. & S. F. Ry. Co. v. United States (1913), 231 U. S. 736, 34 Sup. Ct. Rep. 316, 58 L. Ed. 460. Decree of Commerce Court affirmed and Commission's order held to be valid.
2. Chicago Lumber & Coal Co. v. Tioga S. E. Ry. Co. (1909), 16 I. C. C. Rep. 323, 334.
  3. Advances in Rates—Eastern Case: In Re Investigation of Advances in Rates by Carriers in Official Classification Territory (1911), 20 I. C. C. Rep. 243, 248.

#### 613-AA. COMMISSION NO POWER TO SUBSTITUTE A NEW RATE FOR A JUST AND REASONABLE RATE.

An order of the Interstate Commerce Commission setting aside new rates on lumber from Willamette Valley points to San Francisco and bay points, and restoring substantially the old rates, is void as beyond its powers, where, from the record and the opinion of the Commission, and from the express exclusion of Portland from the benefit of the reduced rate, and the reasons assigned for such exclusion, it is clear that the Commission was not exercising its authority to condemn unjust and unreasonable rates and fix reasonable ones, but was acting upon the assumption that it had the right to protect the lumber interests from the consequences of a change in rates, even if the change was from a rate which had been fixed unreasonably low, for the purpose of encouraging the industry, to a higher rate which is not in itself unjust or unreasonable.<sup>1</sup>

A carrier is entitled to a finding by the Commission that any particular charge is unreasonable and unjust before it is required to change such charge.<sup>2</sup>

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1. Southern P. Co. v. Interstate Commerce Commission (1911), 219 U. S. 433, 443, 31 Sup. Ct. Rep. 288, 55 L. Ed. 283. The Interstate Commerce Commission in reviewing the decision of the Supreme Court in the Willamette Valley case (Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433) stated: "This case concerns an order of the Commission establishing rates for the transportation of green fir lumber, in carloads, from the Willamette Valley to San Francisco Bay points.

"With but a brief interval the Southern Pacific had maintained for six years for this service a rate of \$3.10 per ton from certain points and \$3.35 per ton from certain other points. In April, 1907, a rate of \$5.00 per ton was established from all points. This rate the Commission held to be unreasonable in so far as it exceeded \$3.40 from those points at which the \$3.10 rate had been maintained and \$3.65 from those points to which the \$3.35 rate had been applied. It will be seen that an advance of about 10 per cent was allowed above the rates voluntarily established and for six years maintained by the carrier itself.

"It appeared upon the hearing that the \$3.10 rate had been established after investigation by the Southern Pacific Co. and upon the understanding by that company that a lumber business in the Willamette Valley could not be successfully conducted upon a higher basis of rates. It was claimed that in case of one large operation there was an agreement to the effect that this rate should not be exceeded but no such contract was found by the Commission. It did appear, however, that extensive mills had been constructed during these six years, involving the outlay of great sums of money, and that large tracts had been bought upon the assumption that this rate was regarded by the Southern Pacific as, on the whole, a fair one, and that it would be maintained. It conclusively appeared that the action of the Southern Pacific in advancing that rate to \$5 seriously impaired the value of all this property and in some instances amounted to virtual confiscation.

"These facts were developed in the testimony and were referred to by the Commission in its opinion, but the case was not decided upon this ground alone, nor, indeed, was this the principal subject of consideration. We carefully examined the method in which this lumber was handled, the cost of its transportation, and the financial condition of the line between San Francisco and Portland. From this examination we reached the conclusion that the handling of this traffic at the old rate was remunerative and that upon the whole situation, while the original rate might be somewhat advanced, it should not exceed the figures stated above.

"Upon proceedings to enjoin the enforcement of this order the circuit court refused an injunction, but the Supreme Court reversed the court below and held that the order of the Commission was unlawful.

"The carrier attacked the order upon the ground that it was not an attempt upon the part of the Commission to establish a reasonable rate of transportation, but was rather in the nature of a decree enforcing an equitable estoppel between these parties. Below is given the language of the Supreme Court stating the question presented to it and its conclusion:

"It is clear therefore, as we have said at the outset, that the result of the contentions and concessions of the respective parties is to reduce the controversy to a single issue, which is: What was the nature and character of the order made by the Commission? That is, what, in substance, was the power which the Commission exerted in making the order?

"Coming to the consideration of that subject, we are of the opinion that the court below erred in not restraining the enforcement of the order complained of, because we see no escape from the conclusion that the order was void because it was made in consequence of the assumption by the Commission that it possessed the extreme powers which the railroad companies insist the order plainly manifests."

"It is impossible to say exactly what significance should attach to this decision. The court did not find that the rate established was too low. It apparently held that the Commission was not undertaking to establish a reasonable rate, but, rather, to enforce the contracts and understandings between the parties under which the old rate had been put in and maintained. Of course, the Commission has no such power, and if it attempted to exercise that power its order was clearly unlawful.

"If, upon the other hand, this is to be interpreted as a holding that in passing upon the justice of an advance in a rate of transportation this body cannot consider those rates which have been voluntarily established and maintained by carriers, the investments which have been made, the development which has occurred upon the strength of such rates, and the effect upon business and financial interests which the advance involves, then that decision would be a most important and a most unfortunate one. This Commission has never understood that it was a court of equity, with power to enforce by its orders the law of equity, but it has supposed that it was an administrative tribunal, whose duty it was to do equity between the carrier and the shipper in so far as might properly be done.

"If, in passing upon the advances in freight rates like that involved in the Willamette case, this Commission could only consider the cost of the service, and if, therefore, subject to that limitation, carriers were free to manipulate their rates as they saw fit, this Commission would be without power to prevent the most glaring injustice. The rates of this country have not been and are not based upon the cost of service, and to confine the regulating body to that consideration, while carriers were left free to vary their rates for other causes, would be to put the property interests of this country at the mercy of its railroads, without that restraint which, in our opinion, the Congress by the act to regulate commerce intended to impose." (Twenty-fifth Annual Report of I. C. C., 1911.)

2. Interstate Commerce Commission v. Stickney (1909), 215 U. S. 98, 105, 30 Sup. Ct. Rep. 66, 54 L. Ed. 112.

#### 613-BB. COMMISSION NO POWER TO ANNUL A RATE EXCEPT BY A FORMAL ORDER MADE IN CONFORMITY WITH SECTION 15 OF THE ACT.

The Interstate Commerce Commission has no power to annul or change a rate, regulation, or practice established by a railroad company by its filed and published schedules, except by a formal order made in conformity with section 15 of the Interstate Commerce Act.<sup>1</sup>

The carrier is entitled to have a finding that any particular charge is unreasonable and unjust before it is required to change such charge.<sup>2</sup>

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1. American Sugar Refining Co. v. Delaware L. & W. Ry. Co. (1913), 207 Fed. Rep. 733, 125 C. C. A. 251, reversing, American Sugar Refining Co. v. Delaware L. & W. Ry. Co. (1912), 200 Fed. Rep. 652.
  2. Interstate Commerce Commission v. Stickney (1909), 215 U. S. 98, 105, 30 Sup. Ct. Rep. 665, 54 L. Ed. 112.

#### 613-CC. COMMISSION NO POWER TO EQUALIZE RATES.

The Commission cannot equalize commercial disparities or natural advantages by an adjustment of freight rates.<sup>1</sup> The Commission

cannot overcome by an adjustment of freight rates natural advantages, such as water competition and climatic conditions, which one competing locality has over another.<sup>2</sup>

It is no part of the Commission's duty or right to equalize markets, except as that result may be incident to the correction of a substantial injustice in rates, in whatever form published at the respective competitive points.<sup>3</sup>

It is not within the power of the Commission to equalize economic conditions or to place one market in a position to compete on equal terms with another as against natural advantages. Nor has it power to require railroads in the face of varying trade conditions, to adjust their rates in such a manner as to assure to a market the continuance to a trade it has once enjoyed.<sup>4</sup>

In *Ponchatoula Farmers Assn. v. Illinois C. Rd. Co.*<sup>5</sup> the Commission said: "The Commission cannot lawfully base rates upon the profits derived in a particular business. It might be that in a favorable season the farmers of Ponchatoula would receive large and generous returns from their labors, but this fact would not justify the carriers in charging for transporting the vegetables to market more than a reasonable rate for the service performed. In another season the market prices might be such that there would be little or no profit in the business, yet such fact would not justify the Commission in requiring the carriers to transport the produce at a less rate than would be reasonable for the service performed. The law does not require the carriers to regulate the price of transportation upon the basis of profits to the shipper, and in authorizing the Commission to fix reasonable rates the law presumes that the measure of reasonableness will be based upon all the many elements of the particular traffic involved."

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1. In the Matter of the Investigation of Alleged Unreasonable Rates and Practices involved in the Transportation of Live Stock, Packing-House Products, and Fresh Meats from Various Southwestern Points to Packing Houses, and from Thence to Various Destinations (1911), 22 I. C. C. Rep. 160, 163; Carstens Packing Co. v. Oregon & W. Rd. Co. (1911), 22 I. C. C. Rep. 77, 81; In the Matter of the Investigation and Suspension of Advances in Rates for the Transportation of Coal by the Chesapeake & Ohio Railway Co., et al., and Their Connections (1912), 22 I. C. C. Rep. 604, 613; Douglas & Co. v. Chicago, R. I. & P. Ry. Co. (1911), 21 I. C. C. Rep. 541, 543.
  2. Truck Growers Assn. of Charleston District, Charleston, S. C., v. Atlantic C. L. Rd. Co. (1911), 20 I. C. C. Rep. 190.
  3. Sioux City Terminal Elevator Co. v. Chicago, M. & St. P. Ry. Co. (1912), 23 I. C. C. Rep. 98, 109; Association of Bituminous Coal Operators of Central Pennsylvania v. Pennsylvania Rd. Co. (1912), 23 I. C. C. Rep. 385, 391.
  4. Baltimore Chamber of Commerce v. Baltimore & O. Rd. Co. (1912), 22 I. C. C. Rep. 596, 603; Ashland Fire Brick Co. v. Southern Ry. Co. (1911), 22 I. C. C. Rep. 115, 121; Elk Cement & Lime Co. v. Baltimore & O. Rd. Co. (1911), 22 I. C. C. Rep. 84.
  5. Ponchatoula Farmers' Assn., Ltd. v. Illinois C. Rd. Co. (1910), 19 I. C. C. Rep. 513, 515; Florida Fruit & Vegetable Shippers' Protective Assn. v. Atlantic C. L. Rd. Co. (1911), 22 I. C. C. Rep. 11, 14.

613-DD. NOT WITHIN THE PROVINCE OF THE COMMISSION TO REQUIRE CARRIERS TO ADJUST THEIR RATES SO AS TO EQUALIZE NATURAL OR COMMERCIAL ADVANTAGES.

The Commission has repeatedly held that it is not its function to equalize commercial conditions or natural disadvantages or to neutral-

ize geographical advantages by such adjustments in rates as will enable a shipper to compete in markets otherwise closed to him.<sup>1</sup>

1. Great Western Sand & Gravel Co. v. Chicago, M. & St. P. Ry. Co. (1917), 45 I. C. C. Rep. 529, 530; Connor Lumber & Land Co. v. Akron, C. & Y. Ry. Co. (1916), 40 I. C. C. Rep. 111; In the Matter of Import and Domestic Rates—Clay (1916), 39 I. C. C. Rep. 132, 135; Louisville Cotton Seed Products Co. v. Louisville & N. Rd. Co. (1913), 26 I. C. C. Rep. 607; Pulp & Paper Mfrs. Traffic Assn. v. Chicago, M. & St. P. Ry. Co. (1913), 27 I. C. C. Rep. 83; Port Arthur Board of Trade v. Abilene & S. Ry. Co. (1913), 27 I. C. C. Rep. 388; Alpha Portland Cement Co. v. Baltimore & O. Rd. Co. (1915), 34 I. C. C. Rep. 414; Interstate Commerce Commission v. Difffenbaugh (1911), 222 U. S. 42, 46, 32 Sup. Ct. Rep. 22, 56 L. Ed. 83; Western Pine Mfrs. Assn. v. Cincinnati, I. & W. Rd. Co. (1917), 46 I. C. C. Rep. 650, 653; Sloss-Sheffield Steel & Iron Co. v. Louisville & N. Rd. Co. (1917), 46 I. C. C. Rep. 558, 562, 563.

#### 613-EE. COMMISSION NO POWER TO PROTECT AMERICAN MANUFACTURERS AND PRODUCERS FROM FOREIGN COMPETITION.

In *Big Basin Lumber Co. v. Southern P. Co.*<sup>1</sup> the Commission stated: "The Commission has repeatedly held that it cannot equalize commercial or industrial conditions. And it is, of course, without power to pass upon the reasonableness of the rate from Madera to El Paso. The protection of American manufacturers and producers from foreign competition is not within the powers of this Commission. In *A. T. & S. F. Ry. v. Interstate C. Commission*, 190 Fed, 591, the court said, page 594:

"As early as 1896 \* \* \* the Supreme Court said in *T. & P. Ry. Co. v. I. C. C.*, 162 U. S. 197, at page 221:

"Our reading of the act does not disclose any purpose or intention on the part of Congress to thereby reenforce the provisions of the tariff laws. These laws differ wholly in their objects from the law to regulate commerce. Their main purpose is to collect revenues with which to meet the expenditures of the government, and those of their provisions whereby Congress seeks to so adjust rates as to protect American manufacturers and producers from competition by foreign low-priced labor operate equally in all parts of the country."

"Whatever, therefore, the rights of the carrier may be to give reduced rates for the purpose of fostering a new or an established industry or for granting to it a higher measure of protection against foreign competition than Congress through the revenue laws has given it, no such power can lawfully be exercised by the Commission."

1. *Big Basin Lumber Co. v. Southern P. Co.* (1916), 37 I. C. C. Rep. 730, 737, et seq.

#### 613-FF. THE OMISSION OF THE COMMISSION TO FIX A FUTURE RATE IS NOT INCONSISTENT WITH AN ORDER FOR REPARATION FOR PAST INJURIES BY REASON OF THE ASSESSMENT OF AN UNREASONABLE RATE.

In *Baer Bros. Mercantile Co. v. Denver & R. G. Rd. Co.*<sup>1</sup> the United States Supreme Court, per Mr. Justice Lamar, stated: "In proceedings before the Commerce Commission the plaintiff secured an order requiring the defendant to pay it \$3,438.27 as reparation for unreasonable freight rates charged and collected, the fixing of a new and just rate being left for future decision. The carrier failed to make the payment required and the plaintiff thereupon brought suit and recovered judgment for the sum awarded, together with interest and attorneys' fees. This judgment was reversed by the circuit court of appeals, which held that the order was void on its face, and could not be basis of a recovery for the reason that, while reparation had been awarded on the ground that the old rate was unreasonable, the Commission had not fixed a new and just rate for the future.

"1. That the two subjects of reparation and rates may be dealt with in one order is undoubtedly true. *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 446, 51 L. Ed. 561, 27 Sup. Ct. Rep. 350, 9 Ann Cas. 1075; *Robinson v. Baltimore & O. R. Co.*, 222 U. S. 509, 56 L. Ed. 289, 32 Sup. Ct. Rep. 114. But awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is in its nature private and the other public. One is made by the Commission in its quasi judicial capacity to measure past injuries sustained by a private shipper, the other, in its quasi-legislative capacity, to prevent future injury to the public. But testimony showing the unreasonableness of a past rate may also furnish information on which to fix a reasonable future rate, and both subjects can be, and often are, disposed of by the same order. This, however, is not necessarily so. Indeed, under the original commerce act, the two matters could not possibly be combined in a single order for the reason that, while at that time the Commission could order the carrier to desist from unreasonable practices and award damages, it could not fix rates. This brought about an anomalous state of affairs. For if the shipper obtained his order of reparation because of unreasonable charges which the railroad company was ordered to discontinue, a slightly different, but still unreasonable, rate might be put in for the future, which the shipper had to pay and again institute proceedings for reparation. 24 Stat. at L. 384, §15, chap. 104, U. S. Comp. Stat. 1901, p. 3165.

"2. This situation was dealt with by the Hepburn act, which, in addition to the existing power to make reparation, conferred upon the Commission the new power to make rates for the future. But the two matters were treated as different subjects and were dealt with in separate sections. Section 4 conferred the power of making rates. Section 5 gave the Commission power to make reparation orders. 34 Stat. at L. 589, 590. §§4, 5, chap. 3591, U. S. Comp. Stat. Supp. 1911, pp. 1297, 1301. Not only were the two functions separately treated, but an analysis of the act shows that there is no such necessary connection between them as to make the quasi judicial order for reparation depend for its validity upon being joined with a quasi legislative order fixing rates. Persons entitled to one may have no interest in the other. Persons interested in both may be entitled to reparation, and not to a new rate; or to a new rate, and not to reparation. For example, §13 permits 'any mercantile, agricultural, or manufacturing society or anybody politic or municipal organization to make complaints against the carrier.' On the application of such bodies, old rates might be declared unjust and new rates established; but, of course, no reparation would be given, for the reason that such complainants were not shippers, and therefore not entitled to an award of pecuniary damages. Cf. *Louisville & N. R. Co. v. Interstate Commerce Commission*, 227 U. S. 89, 57 L. Ed. 431, 33 Sup. Ct. Rep. 185. Then, too, there are cases in which a rate, reasonable when made, becomes unreasonable as the result of a gradual change in conditions, so that no reparation is ordered even though a new rate be established for the future. *Anadarko Cotton Oil Co. v. Atchison, T. & S. F. R. Co.*, 20 Inters. Com. Rep. 43. Conversely, there may be cases where what was an unreasonable rate in the past is found to be reasonable at the date of the hearing. In such a case reparation would be awarded

for past unreasonable charges collected, but no new rate would be established for the future.

"3. It may, however, be said that even in such a case, the order, while condemning the rate for the past, should contain a provision validating it for the future. But while this consideration might show that it was erroneous not to name the new rate, it would not follow that the order awarding reparation was void. The Hepburn Act treats the two subjects as related, but independent. The two grounds of complaint may be joint or separate, and the very fact that they may sometimes be separate shows that the presence of both is not jurisdictional, and that the absence of a provision for one need not operate to invalidate an order as to the other.

"This conclusion is strengthened by considering the hardships that would result from nullifying a reparation order for error in omitting a provision for the future rate. It would punish the shipper for the failure of the Commission. It would deprive him of his award of damages for his private injury, because of the Commission's omission to make a rate for the benefit of the public. The shipper might or might not intend to remain in business. He might or he might not be interested in future rates. He might have been able to prove unreasonableness as to the past without being able to furnish evidence as to what would be reasonable for the future. Or, the Commission might be in a position to say with certainty that the rates had been unreasonable, and award reparation accordingly, but it might require a protracted and lengthy hearing to establish what would be just for the future. To make the shipper wait on such a finding, and deprive him of his present right of reparation, until the determination of an independent question, would work a hardship not contemplated by the act and not required by any of its provisions."

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1. Baer Bros. Mercantile Co. v. Denver & R. G. Rd. Co. (1914), 233 U. S. 479, 58 L. Ed. 1055, 34 Sup. Ct. Rep. 641. The history of this case is as follows: Baer Bros. Mercantile Co. v. Missouri P. Ry. Co. (1908), 13 I. C. C. Rep. 329. Reparation awarded on account of unreasonable rates collected for the transportation of beer from Pueblo, Colo. to Leadville, Colo., originating in St. Louis, Mo. Baer Bros. Mercantile Co. v. Missouri P. Ry. Co. (C. C. D. Col.) (not reported). Action brought to enforce order of Commission on award of reparation. At the trial the court directed a verdict and rendered judgment in favor of the plaintiff. Denver & R. G. Rd. Co. v. Baer Bros. Mercantile Co. (1911), 187 Fed. Rep. 485. Lower court reversed. Order prescribing maximum rate for future should have been entered as condition precedent to an award of reparation. Baer Bros. Mercantile Co. v. Denver & R. G. Rd. Co. (1914), 233 U. S. 479, *supra*. Circuit Court of Appeals reversed and decision of Circuit Court affirmed.

#### 613-GG. JURISDICTION OF COMMISSION OVER RATES FOR TRANSPORTATION OF GOVERNMENTAL MATERIALS AND WAR TRAFFIC.

In *United States v. Alabama & V. Ry. Co.*<sup>1</sup> the Commission stated: "Section 22 of the act to regulate commerce provides 'That nothing in this act shall prevent the carriage \* \* \* of property free or at reduced rates for the United States \* \* \*.' No rates are published on the articles involved by any of the defendants, and only the southern classification provides a rating for them.

"Defendants challenge our power to require the establishment of ratings, on the ground that they are not 'common carriers' of government stamped articles, but are essentially private carriers under special

contracts. They have been and are, however, ready and willing to transport these articles for the government at rates satisfactory to them, and we are not asked to prescribe ratings for the benefit of the general public. Under the circumstances we think we have authority to prescribe reasonable ratings for the traffic in question, although, under section 22 of the act, the carrier and the government may agree upon some other rate. Conference Ruling 36. The tariff rate or classification rating is the maximum which the carriers may demand from the government. Conference Ruling 218."

Section 1 of the Interstate Commerce Act, providing for preference and priority for the transportation of traffic during the period of war, provides as follows:

For the transportation of persons or property in carrying out the orders and directions of the President, just and reasonable rates shall be fixed by the Interstate Commerce Commission.

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1. United States v. Alabama & V. Ry. Co. (1916), 40 I. C. C. Rep. 405, 406.

**613-HH. COMMISSION'S "FLEXIBLE LIMIT OF JUDGMENT WHICH BELONGS TO THE POWER TO FIX RATES."**

In *Arlington Heights Fruit Exchange v. Southern P. Co.*<sup>1</sup> one of the assignments of error was, to-wit: *The Commission erred in assuming that it has discretion to award or refuse reparation without regard to the fact that the charges collected may have been unreasonable or otherwise unlawful and in denying complainants' claim for reparation under such erroneous assumption.* In this connection, the Commission stated: "To enable us to prescribe reasonable rates the Congress has delegated to us a quasi legislative or administrative power in the exercise of which there inheres necessarily and admittedly a wide but sound discretion aptly termed the 'flexible limit of judgment belongs to the power to fix rates.' *Atlantic Coast Line v. N. Car. Corp. Com'n.*, 206 U. S., 1, 26. We are of the opinion that this 'flexible limit of judgment' obtains equally whether the rate to be fixed is to apply as of the past, for the present, or for the future. The discretion is just as wide and as broad in respect of a past as of a future rate, but in exercising the function the end to be attained in its exercise must be kept in mind. For the future we are endeavoring to prevent a public wrong, as to the past we have to look only to the remedying of a private injury by awarding damages. *Baer Bros. v. Denver & R. G.*, 233 U. S. 479. The only effect of finding a rate attacked unreasonable or otherwise unlawful as of the past is to afford a basis upon which to predicate an award of damages. Moreover, section 16 of the act provides 'that if \* \* \* the Commission shall determine that any party complainant is entitled to an award of damages,' etc., we shall make an order directing the carrier to pay the complainant the sum to which he is entitled. In this case we were of the opinion that complainants had not been damaged, and we were therefore not impressed with the necessity of a finding that the charge assessed in the past was unreasonable. It was not an exercise of an arbitrary discretion to award or not award reparation."

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1. *Arlington Heights Fruit Exchange v. Southern P. Co.* (1917), 45 I. C. C. Rep. 248, 250, et seq.

### 613-II. JUDICIAL REVIEW OF ORDERS OF INTERSTATE COMMERCE COMMISSION.

In *Interstate Commerce Commission v. Illinois C. Rd. Co.*<sup>1</sup> the United States Supreme Court, per Mr. Justice White, stated: "Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence it may be contained in the previous one, *viz.*, whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 698, 39 L. Ed. 311, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conceptions as to whether the administrative power has been wisely exercised.

"Power to make the order, and not the mere expediency or wisdom of having made it, is the question."

In *Southern Ry. Co. v. Tift*<sup>2</sup> the United States Supreme Court, per Mr. Justice McKenna, stated: "In the case at bar, however, there are assignments of error based on the objections to the jurisdiction of the circuit court. These might present serious questions in view of our decision in *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. Rep. 350, upon a different record than that before us. We are not required to say, however, that because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as filed, is forbidden by the interstate commerce act, a suit in equity is also forbidden to prevent a filing or enforcement of a schedule of unreasonable rates or a change to unjust or unreasonable rates. The circuit court granted no relief prejudicial to appellants on the original bill. It sent the parties to the Interstate Commerce Commission, where, upon sufficient pleadings, identical with those before the court, and upon testimony adduced upon the issues made, the decision was adverse to the appellants. This action of the Commission, with its findings and conclusions, was presented to the circuit court, and it was upon these, in effect, the decree of the court was rendered. There was no demurrer to that petition, and the testimony taken before the Commission was stipulated into the case, and the opinion of the court recites that, 'with equal meritorious purpose, counsel for the respective parties agreed that this would stand for and be the hearing for final decree in equity.'

"It was certainly competent for the appellees to proceed in the circuit court under §16 of the interstate commerce act (24 Stat. at L., 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154) and to apply by petition to the circuit court, 'sitting in equity,' and issue an injunction 'or other proper process, mandatory or otherwise,' to enforce the order of the Commission. We think that, under the broad powers conferred upon the circuit court by §16 and the direction there given to the court to proceed with efficiency, but without the formality of equity proceedings, 'but in such manner as to do justice in the premises,' and in view of the stipulation of the parties, recited in the decree of the court, the appellants are precluded from making the objection that the court did not have jurisdiction to entertain the petition and grant the relief prayed for and decreed."

In *Interstate Commerce Commission v. Louisville & N. Rd. Co.*<sup>3</sup> the United States Supreme Court, per Mr. Justice Lamar, stated: "On the appeal here, the government insisted that while the act of 1887 to regulate commerce (24 Stat. at L. 379, §§ 14-16, chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284) made the orders of the Commission only *prima facie* correct, a different result followed from the provision in the Hepburn act of 1906 (34 Stat. at L. 584, §4, chap. 3591, U. S. Comp. Stat. Sup. 1911, p. 1297) that rates should be set aside if after a hearing the 'Commission shall be of the opinion that the charge was unreasonable.' In such case it insisted that the order based on such opinion is conclusive, and (though *Interstate Commerce Commission v. Union P. R. Co.*, 222 U. S. 547, 56 L. Ed. 311, 32 Sup. Ct. Rep. 108, was to the contrary) could not be set aside, even if the finding was wholly without substantial evidence to support it.

"1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficially exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the constitution's condemnation of all arbitrary exercise of power.

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence,' (*Tang Tun v. Edsell*, 223 U. S. 681, 56 L. Ed. 610, 32 Sup. Ct. Rep. 359; *Chin Yow v. United States*, 208 U. S. 13, 52 L. Ed. 370, 28 Sup. Ct. Rep. 201; *Low Wah Suey v. Backus*, 225 U. S. 468, 56 L. Ed. 1167, 32 Sup. Ct. Rep. 734; *Zakonaite v. Wolf*, 226 U. S. 272, 33 Sup. Ct. Rep. 31), or if the facts found do not, as a matter of law, support the order made (*United States v. Baltimore & O. S. W. R. Co.*, 226 U. S. 14, 33 Sup. Ct. Rep. 5, Cf. *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 20, 51 L. Ed. 942, 27 Sup. Ct. Rep. 585; *Wis-*

*consin, M. & P. R. Co. v. Jacobson*, 179 U. S. 301, 45 L. Ed. 201, 21 Sup. Ct. Rep. 115; Washington ex rel. *Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 56 L. Ed. 863, 32 Sup. Ct. Rep. 535; *Interstate Commerce Commission v. Illinois C. Rd. Co.*, 215 U. S. 470, 54 L. Ed. 287, 30 Sup. Ct. Rep. 155; *Southern P. Co. v. Interstate Commerce Commission*, 219 U. S. 433, 55 L. Ed. 283, 31 Sup. Ct. Rep. 288; *Muser v. Magone*, 155 U. S. 247, 39 L. Ed. 137, 15 Sup. Ct. Rep. 77).

“2. The government’s claim is not only opposed to the ruling in *Interstate Commerce Commission v. Union P. R. Co.*, 222 U. S. 547, 56 L. Ed. 311, 32 Sup. Ct. Rep. 108, and the cases there cited, but is contrary to the terms of the act to regulate commerce, which in its present form provides (25 Stat. at L. 861, §6, chap. 382, U. S. Comp. Stat. 1901, p. 3168), for methods of procedure before the Commission that ‘conduces to justice.’ The statute, instead of making its orders conclusive against a direct attack, expressly declares that they may ‘be suspended or set aside by the court of competent jurisdiction.’ 36 Stat. at L. 551, §12, chap. 309. Of course, that can only be done in cases presenting a justifiable question. But whether the order deprives the carrier of a constitutional or statutory right, whether the hearing was adequate and fair, or whether for any reason the order is contrary to law,—are all matters within the scope of judicial power.

“3. Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission’s right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable there was no jurisdiction to make the order. *Interstate Commerce Commission v. Northern P. R. Co.*, 216 U. S. 544, 54 L. Ed. 609, 30 Sup. Ct. Rep. 417. In a case like the present the courts will not review the Commission’s conclusions of fact (*Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 220 U. S. 251, 55 L. Ed. 456, 31 Sup. Ct. Rep. 392), by passing upon the credibility of witnesses or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law, and must, in the language of the statute, be ‘set aside by a court of competent jurisdiction.’ 36 Stat. at L. 551, chap. 309.”

In *Missouri K. & T. Ry. Co. v. Interstate Commerce Commission*<sup>4</sup> the Circuit Court, eastern district Missouri, per Curiam, stated: “1. Neither Congress nor any legislative or administrative board acting by its authorization can competently establish rates for the transportation of property in interstate commerce that will not admit of the carrier earning such compensation for the service rendered as under all the circumstances is just and reasonable to it and to the public, for that would be depriving the carrier of its property without due process of law, and would be taking its property for public use without just compensation, in violation of the fifth amendment to the Constitution.

“2. Power to determine and prescribe what are just and reasonable maximum rates to be charged in interstate commerce, is, in a limited way, conferred upon the Interstate Commerce Commission by existing statute law; but as the Commission acts only as a legislative or

administrative board, and not judicially (*Western Union Telegraph Co. v. Myott* [C. C.] 98 Fed. 335, 355), its determination or action does not, and cannot, preclude judicial inquiry into the justness and reasonableness of the rates, within the meaning of the constitutional guaranty, for that is a judicial question.

\* \* \* \*

"4. Reasonably interpreted, the statute, by which alone the Interstate Commerce Commission derives its power, unmistakably requires that all rates prescribed thereunder shall be just and reasonable, within the constitutional guaranty, and also that they shall not be unjustly discriminatory or unduly preferential; and these requirements plainly operate as limitations upon the power of the Commission.

"5. The power conferred upon the commission is at most one that is merely regulatory of existing vested rights, and is therefore quite distinguishable from the powers conferred upon the General Land Office, the Pension Office, and other like departmental bureaus; for the latter are not engaged in administering laws which are regulatory of existing vested rights, but in executing laws relating to the disposal of the public lands of the nation, to the distribution of its bounty, and the other subjects in respect of which the power of Congress is not subject to the constitutional restrictions before named, but is sufficiently comprehensive to enable it competently to devolve the execution of such laws, including the final determination of all questions of fact, upon any agency it may select for the purpose.

"6. The statute under which the Interstate Commerce Commission derives its power to prescribe rates at all unequivocally recognizes, and, if there be need therefor, it plainly declares, that the Circuit Courts, sitting in equity, are vested with jurisdiction to entertain, hear, and determine suits to compel obedience of orders of the commission prescribing rates, and also suits to annul or enjoin the enforcement of such orders. This is shown (a) by the provision in section 15 (Act Feb. 4, 1887, c. 104, 24 Stat. 384 (U. S. Comp. St. 1901, p. 3165), as amended by Act June 29, 1906, c. 3591, §4, 34 Stat. 589 (U. S. Comp. St. Supp. 1907, p. 900) that 'all orders of the Commission, except orders for the payment of money, shall take effect \* \* \* and shall continue in force \* \* \* not exceeding two years, \* \* \* unless the same shall be \* \* \* suspended or set aside by a court of competent jurisdiction'; (b) by the provision in section 16 that when any carrier fails or neglects to obey 'any order of the commission, other than for the payment of money,' while the same is in effect, any party injured thereby, or the commission in its own name, may apply to the Circuit Court for an enforcement of such order, and 'the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue, or which may arise upon the hearing of such petition'; (c) by the further provision in section 16 that 'the venue of suits brought in any of the Circuit Courts of the United States against the commission to enjoin, set aside, annul, or suspend any order or requirement of the commission shall be in' designated districts, 'and jurisdiction to hear and determine such suits is hereby vested in such courts'; and (d) by the still further provision in section 16 that the provisions of the expedition act (Act

Feb. 11, 1903, c. 544, 32 Stat. 823-U. S. Comp. St. Supp. 1907, p. 951) 'are hereby made applicable to all such suits, including the hearing on an application for a preliminary injunction, and are also made applicable to any proceeding in equity to enforce any order or requirement of the commission.' It is not conceived that the scope of the inquiry which the court is authorized to make, or the effect to be given to the commission's findings or determination upon which its order is based, is intended to be in any wise different when the suit is one to annul or enjoin the enforcement of the order than when it is one to enforce obedience thereto.

"7. It is not intended that the hearing in such a suit, whether it be of the one kind or the other, shall be confined to an ascertainment of what was determined by the commission and to a consideration of the sufficiency of the facts as determined by it to sustain the order; but, on the contrary, the hearing may be de novo, and may include the taking and consideration of evidence other than before the commission.

"8. Whether, if it should appear that in the proceedings before the commission the carrier declined or neglected fairly to avail itself of the opportunity to be heard in opposition to the order, the court, in the exercise of a sound discretion, ought to refuse to grant equitable relief to the carrier upon a showing which could have been but was not, made before the commission, and ought to require that the same be first presented to the commission for its consideration, is a question which does not arise in this case, and it is mentioned now only to indicate that it is not decided by anything said herein.

"9. In approaching the consideration of a case like this the court should start with the presumption that the order is valid, and was made after a careful consideration and a correct determination of every question of fact underlying it, and it should be accorded that respect and influence which ought to attend, and does attend, the action of a legislative or administrative board, whose members are in point of ability, learning and experience specially qualified to determine such matters. In short, the burden of showing that the facts are such as to render the order invalid rests upon the carrier assailing it, and unless the case made on behalf of the carrier is a clear one the order ought to be upheld."

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1. Interstate Commerce Commission v. Illinois C. Rd. Co. (1910), 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. Rep. 155.
  2. Southern Ry. Co. v. Tift (1907), 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. Rep. 709. The history of the yellow pine lumber case is as follows: Tift v. Southern Ry. Co. (1903), (C. C. S. D. Ga.) (not reported.) Temporary injunction restraining carriers from making an advance of 2 cents per 100 pounds in the rate on yellow pine lumber from Georgia to Chattanooga, Tenn. and other points, and dissolved for the reason that the proposed advance had not been made effective. Tift v. Southern Ry. Co. (1903), 123 Fed. Rep. 789. The advanced rates being in effect an injunction restraining the enforcement of the advance was denied for the reason that a complaint against the advance had been filed with the Commission. It was held that judicial action should be withheld until the Commission acted. Tift v. Southern Ry. Co. (1905), 10 I. C. C. Rep. 548. The advance was held to be unreasonable and the carriers were ordered to discontinue it. Tift v. Southern Ry. Co. (1905), 138 Fed. Rep. 753. Commission's order held to be valid. Carriers restrained from enforcing the advance; and reparation awarded in accordance with stipulation. Southern Ry. Co. v. Tift (1906), 148 Fed. Rep. 1021. Commission's order held to be valid. Carriers restrained from enforcing the advance; and reparation awarded in accordance with stipulation. Southern Ry. Co. v. Tift (1907), 206 U. S. 428, supra. Commission's order held to be valid. Carriers restrained from enforcing the advance; and reparation awarded in accordance with stipulation.

3. Interstate Commerce Commission v. Louisville & N. Rd. Co. (1913), 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. Rep. 185. The history of the New Orleans Board of Trade case is as follows: New Orleans Board of Trade v. Louisville & N. Rd. Co. (1909), 17 I. C. C. Rep. 231. Carriers ordered to reduce to a specified amount their class rates from New Orleans, La. to Mobile, Ala., and Pensacola, Fla., on the ground that the present rates are unreasonable. Louisville & N. Rd. Co. v. Interstate Commerce Commission (1910), 184 Fed. Rep. 118. Preliminary injunction against enforcement of Commission's order denied. Bill to annul Commission's order transferred to Commerce Court. Louisville & N. Rd. Co. v. Interstate Commerce Commission (1912), 195 Fed. Rep. 541. Commission's order held invalid on the ground that there was no basis for the Commission to hold that the existing rates are unreasonable. Interstate Commerce Commission v. Louisville & N. Rd. Co. (1913), 227 U. S. 88, *supra*. Commissions order held to be valid in all respects.
4. Missouri K. & T. Ry. Co. v. Interstate Commerce Commission (1908), 164 Fed. Rep. 645, 647, et seq.

#### 613-JJ. POWER OF COMMISSION OVER LOCAL STATE RATE ON THROUGH INTERSTATE SHIPMENT.

In *Baer Bros. Mercantile Co. v. Denver & R. G. Rd. Co.*<sup>1</sup> the United States Supreme Court held that the Interstate Commerce Commission has jurisdiction to pass upon the reasonableness of the Denver & Rio Grande Railroad Company's freight rate from Pueblo to Leadville, both in the state of Colorado, on beer received at St. Louis by the Missouri Pacific Railroad Company to be delivered in Leadville, although no through rate or through route had been established, and although the freight was received by the first-named carrier at Pueblo as an independent shipment originating at that point, and was forwarded as an intrastate shipment on a local waybill, where all this was in accordance with a long-continued course of dealing between the two carriers under which they divided the freight according to their local rates, with the knowledge that it had been paid as compensation for the single haul.

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1. *Baer Bros. Mercantile Co. v. Denver & R. G. Rd. Co.* (1914), 233 U. S. 479, 58 L. Ed. 1055, 34 Sup. Ct. Rep. 641.

#### 613-KK. POWER OF COMMISSION OVER FIXATION OF TERMS AND COMPENSATION FOR COMMON USE OF TERMINAL FACILITIES.

The Interstate Commerce Act, as amended Feb. 28, 1920, contains the following provisions with reference to the power of the Commission to require the common use of terminals and the fixing of the terms and compensation for the use thereof.<sup>1</sup>

If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is re-

quired to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

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1. Interstate Commerce Act, Section 3 (4), added by Transportation Act of February 28, 1920.

#### 613-LL. JURISDICTION OF COMMISSION OVER RATES ON EXPORT AND IMPORT TRAFFIC.

The jurisdiction of the Commission over export business is limited to the rail haul from the interior point to the port of export, and on import traffic from the port of entry to the interior destination. It follows that the rail carrier must publish and maintain only its charges between the interior points and the port and cannot make and publish through export rates applying from the interior point, where the traffic was taken up by the rail carrier, to the foreign port of destination.<sup>1</sup>

In *Texas & N. O. Rd. Co. v. Sabine Tram Co.*<sup>2</sup> the United States Supreme Court held that a shipment of lumber destined by the purchaser for export, made by the seller under a local bill of lading from an interior point in Texas to a Texas gulf port at which the lumber was unloaded without delay by the purchaser's order into slips or docks in reach of the ship's tackle and was then loaded into chartered ships, by which it was carried to foreign ports—such shipment not being an isolated one but typical of many others—constitutes foreign commerce and as such is governed by the tariffs on file with the Interstate Commerce Commission to the exclusion of the rates established by the state railroad commission, although the seller had no connection with the lumber after it reached the railway terminus, and had no concern with its destination after it came into the hands of the purchaser, and no knowledge thereof, and although the lumber had no definite foreign destination at the time of the initial shipment.

In *Railroad Commission of Louisiana v. Texas & P. Ry. Co.*<sup>3</sup> the United States Supreme Court held that shipments of freight under local bills of lading calling for transportation from interior points in Louisiana to New Orleans, there to be delivered to the shipper's or consignee's order, but intended by the shippers to be exported to foreign countries, and treated accordingly by both shippers and carriers, constitute foreign commerce, and as such are governed as to the intrastate transportation by the tariffs on file with the Interstate Commerce Commission, to the exclusion of the rates established by the state railroad commission.

In *Southern P. T. Co. v. Interstate Commerce Commission*<sup>4</sup> the United States Supreme Court held that an order of the Interstate Commerce Commission forbidding a carrier to give an undue preference in the use of its wharves at a seaport to an exporter of cotton-seed

products is not a regulation of purely intrastate or purely foreign commerce, which would be beyond the power of the Commission, where the cotton-seed products purchased by him, whether at points within or without the state, are all destined for export, and the concentration and manufacture of cotton-seed cake into meal on the wharves are but incidents in the transshipment of the products in export trade.

1. Galveston Commercial Assn. v. Atchison, T. & S. F. Ry. Co. (1912), 25 I. C. C. Rep. 216; citing, Cosmopolitan Shipping Co. v. Hamburg-American Packet Co. (1908), 13 I. C. C. Rep. 266.
2. Texas & N. O. Rd. Co. v. Sabine Tram Co. (1913), 227 U. S. 111, 57 L. Ed. 443, 33 Sup. Ct. Rep. 229.
3. Railroad Commission of Louisiana v. Texas & P. Ry. Co. (1913), 229 U. S. 336, 57 L. Ed. 1215, 33 Sup. Ct. Rep. 837.
4. Southern P. Terminal Co. v. Interstate Commerce Commission (1911), 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. Rep. 279. The history of the Galveston Wharfage case is as follows: Eichenberg v. Southern P. Co. (1908), 14 I. C. C. Rep. 250. Carriers ordered to discontinue their practice of granting to one Young exclusive wharfage facilities at Galveston, Tex., and exempting him from payment of wharfage charges, while denying similar facilities to other shippers and exacting wharfage charges from them on the ground that the existing practice constitutes an undue preference under section 3. Southern P. T. Co. v. Interstate Commerce Commission (1908), 166 Fed. Rep. 134. Preliminary injunction against enforcement of Commission's order denied. Application to certify case to Supreme Court denied. Southern P. T. Co. v. Interstate Commerce Commission (1909), (C. C. S. D. Tex.) (not reported). Commission's order held to be valid. Southern P. T. Co. v. Interstate Commerce Commission (1911), 219 U. S. 498, supra. Commission's order held to be valid on the ground that the practice of the carriers constitute an undue preference. Eichenberg v. Southern P. Co. (1913), 28 I. C. C. Rep. 584. Reparation awarded.

#### 613-MM. AUTHORITY OF DIVISIONS OF THE COMMISSION TO DETERMINE QUESTIONS UNDER THE ACT.

Section 17 of the Interstate Commerce Act (*as amended August 9, 1917*), provides as follows:

In conformity with and subject to the order or orders of the Commission in the premises, each division so constituted shall have power and authority by a majority thereof to hear and determine, order, certify, report, or otherwise act as to any of said work, business, or functions so assigned or referred to it for action by the Commission, and in respect thereof the division shall have all the jurisdiction and powers now or then conferred by law upon the Commission, and be subject to the same duties and obligations. Any order, decision, or report made or other action taken by any of said divisions in respect to any matters so assigned or referred to it shall have the same force and effect, and may be made, evidenced, and enforced in the same manner as if made, or taken by the Commission, subject to rehearing by the Commission, as provided in section sixteen-a hereof for rehearing cases decided by the Commission. The secretary and seal of the Commission shall be the secretary and seal of each division thereof.

Nothing in this section contained, or done pursuant thereto, shall be deemed to divest the Commission of any of its powers.

#### 613-NN. POWER OF COMMISSION TO PRESCRIBE RATE, CLASSIFICATION, REGULATION OR PRACTICE TO GOVERN INTRASTATE COMMERCE IN ORDER TO REMOVE A PREFERENCE, PREJUDICE, OR DISCRIMINATION AGAINST INTERSTATE OR FOREIGN COMMERCE.

The *Shreveport Cases*<sup>1</sup> involved an order of the Interstate Commerce Commission requiring the carriers to remove a discrimination against Shreveport, La., which resulted from the action of the carriers in charging higher rates, according to distance, on interstate traffic from Shreveport than on intrastate traffic from Dallas and Houston, Texas, to destination points in Texas.

The proceeding was brought before the Commission by the railroad commission of Louisiana under direction of the legislature of that state, and had two objects: (1) To secure an adjustment of rates that would be just and reasonable from Shreveport into Texas; and (2) to end, if possible, the alleged unjust discrimination practiced by these interstate railroads in favor of Texas state traffic and against similar traffic between Louisiana and Texas.

With regard to the alleged discrimination, the Commission in its report, 23 I. C. C. Rep. 31, said:

The railroads deny that the rates put out of Shreveport are unreasonable, but place their defense mainly upon the proposition that they are compelled by the railroad commission of Texas to effect the discrimination here involved. \* \* \* There appears to be little question as to the policy of the Texas commission. It is frankly one of protection to its own industries and communities. \* \* \* Passing, then, to the question of discrimination, has this Commission the power to say that whatever rates an interstate carrier makes between points in Texas shall not be exceeded for the same distance under like conditions between Shreveport and Texas points? In other words, may a carrier engaged in interstate commerce discriminate against a city beyond the border of a state by imposing upon that city's traffic rates which deny its shippers access upon equal terms to the communities of an adjoining state?

This is an appeal to the powers lodged in this Commission under the third section of the act—that provision which is aimed at the destruction of undue preference and advantage. We thus meet direct the most delicate problem arising under our dual system of government. Congress asserts its exclusive dominion over interstate commerce; the state asserts its absolute control over state commerce. The state for its own purposes establishes rates designed to protect its own communities and promote the development of its own industries. These rates are adopted by the interstate carriers upon state traffic, but are not adopted upon interstate traffic. Thus arises a discrimination in favor of communities within the state, and interstate commerce suffers a corresponding disadvantage. May this Commission end such discrimination by saying to the interstate carrier, "You may not distinguish between state and interstate traffic transported under similar conditions. If the rates prescribed for you by state authority are not compensatory upon this specific traffic as to which discrimination is found, the burden rests with you, irrespective of your obligation to the state, to so adjust your rates that justice will be done between communities, regardless of the invisible state line which divides them." To which we are compelled to answer that the effective exercise of its power regarding interstate commerce makes necessary the assertion of the supreme authority of the National Government, and that the Congress has appropriately exercised this power in the provisions of the act to regulate commerce touching discrimination.

The Supreme Court described the situation substantially as follows:

Shreveport, La., is about 40 miles from the Texas state line and 231 miles from Houston, Tex., on the line of the Houston, East & West Texas and Houston & Shreveport Companies (which are affiliated in interest); it is 189 miles from Dallas, Tex., on the line of the Texas & Pacific. Shreveport competes with both cities for the trade of intervening territory. The rates on these lines from Dallas and Houston, respectively, eastward to intermediate points in Texas were much less, according to distance, than from Shreveport westward to the same points. It is undisputed that the difference was substantial, and injuriously affected the commerce of Shreveport. It appeared for example, that a rate of 60 cents carried first-class traffic a distance of 160 miles to the eastward from Dallas, while the same rate would carry the same class of traffic only 55 miles into Texas from Shreveport. The first-class rate from Houston to Lufkin, Tex., 118.2 miles, was 50 cents per 100 pounds, while the rate from Shreveport to the same point, 112.5 miles, was 69 cents. The rate on wagons from Dallas to Marshall, Tex., 147.7 miles, was 36.8 cents, and from Shreveport to Marshall, 42 miles, 56 cents. The rate on furniture from Dallas to Longview, Tex., 124 miles, was 28.8 cents, and that from Shreveport to Longview, 65.7 miles, was 35 cents. These instances of differences in rates are merely illustrative; they serve to indicate the character of the rate adjustment.

The Commission found that interstate class rates from Shreveport to such Texas points were unreasonably high, and it established maximum class rates to be substituted therefor. These rates were substantially the same as the class rates fixed by the railroad commission of Texas, and charged by the carriers, for transportation for similar distances in the state of Texas. The Commission also found that the carriers maintained higher commodity rates, according to distance,

from Shreveport to the Texas points than were in force from cities in Texas to such Texas points, and that thereby an unlawful, and undue preference was given to the Texas cities and a discrimination that was undue and unlawful was effected against Shreveport.

In order to correct this discrimination the carriers were directed to desist from charging higher rates for the transportation of any commodity from Shreveport toward Dallas and Houston, respectively, and intermediate points than were contemporaneously charged for the carriage of such commodity from Dallas and Houston toward Shreveport for equal distances.

In their petition in the Commerce Court to annul the Commission's order, the carriers assailed the order in its entirety, but subsequently they withdrew their opposition to the fixing of maximum class rates and these rates were put in force. The attack was continued upon that portion of the order which prohibited higher rates for carrying articles from Shreveport into Texas than those charged for eastbound traffic from Dallas and Houston, respectively, for equal distances.

The point of objection was that as the discrimination found by the Commission to be unjust arose out of the relation of intrastate rates, maintained under state authority, to interstate rates, upheld by it as reasonable, its correction was beyond the power of the Commission. The point was urged in a twofold aspect: (1) That Congress is impotent to control the intrastate charges of an interstate carrier even to the extent necessary to prevent unjust discrimination against interstate traffic; and (2) that, if it be assumed that Congress has this power, still it has not been exercised or delegated to the Commission, and hence the action of the Commission exceeded the limits of the authority which had been conferred upon it.

The Commerce Court sustained the Commission's order and dismissed the petition, 205 Fed. 380. The carriers appealed.

In affirming the decree of the Commerce Court and sustaining the Commission's order the Supreme Court held that— .

Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the State, and not the Nation, would be supreme in the national field.

The power to deal with the relation between intrastate and interstate rates, the court held, lies exclusively with Congress, and in the exercise of that power Congress can remove, directly or through the aid of a subordinate body, a discrimination arising from the relation of intrastate to interstate rates.

After quoting section 3 of the act making unlawful any undue or unreasonable preference or advantage, also any undue or unreasonable prejudice or disadvantage, and the proviso of section 1, to the effect that the act to regulate commerce shall not apply to commerce, wholly within one state, the court held that the Commission was authorized and empowered to deal with the situation before it in these cases.

Mr. Justice Hughes, speaking for the court, concluded the decision with these words :

The further objection is made that the prohibition of Section 3 is directed against unjust discrimination or undue preference only when it arises from the voluntary act

of the carrier and does not relate to acts which are the result of conditions wholly beyond its control. *East Tennessee, etc., Rwy. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 18. The reference is not to any inherent lack of control arising out of traffic conditions, but to the requirements of the local authorities which are assumed to be binding upon the carriers. The contention is thus merely a repetition in another form of the argument that the Commission exceeded its power; for it would not be contended that local rates could nullify the lawful exercise of Federal authority. In the view that the Commission was entitled to make the order, there is no longer compulsion upon the carriers by virtue of any inconsistent local requirement. We are not unmindful of the gravity of the question that is presented when State and Federal views conflict. But it was recognized at the beginning that the Nation could not prosper if interstate and foreign trade were governed by many masters, and where the interests of the freedom of interstate commerce are involved the judgment of Congress and of the agencies it lawfully establishes must control.

Section 13 of the Interstate Commerce Act (*as amended February 28, 1920*) contains the following provisions:

Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which, petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any proposition of this Act.

Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

*In The Matter of Intrastate Rates Within the State of Illinois*<sup>2</sup> certain intrastate fares of the respondent steam railroads in Illinois, lower than the corresponding interstate fares and charges authorized by the order of the Interstate Commerce Commission in *Ex Parte 74, Increased Rates, 1920*, 58 I. C. C., 220 and 302, and maintained through action of state authority, found to be unduly preferential of intrastate passengers, unduly prejudicial to interstate passengers, and unjustly discriminatory against interstate commerce. Fares and charges prescribed which will remove such preference, prejudice, and discrimination.

A verbatim copy of the Commission's report in this case is found in the footnotes.

*In the Matter of Rates, Fares and Charges of the New York Central Railroad Company and Other Railroad Companies in the State of New York*<sup>3</sup> certain fares, charges, and rates required by state authority to be maintained by the respondents within the state of New York found to be lower than the corresponding interstate fares, charges, and rates authorized by the order in *Ex Parte 74, Increased Rates, 1920*, and to be unduly prejudicial to Interstate passengers and ship-

pers, unduly preferential of intrastate passengers and Shippers, and unjustly discriminatory against interstate commerce.

A verbatim copy of the Commission's report in this case is found in the footnotes.

*In the Matter of Intrastate Rates within the State of Illinois*<sup>4</sup> certain rates and charges for freight services in the transportation of milk and cream, required by State authority to be maintained by the respondent carriers within the State of Illinois, were found to be lower than the corresponding rates and charges authorized in Ex Parte 74, *Increased Rates* (1920), 58 I. C. C. Rep. 220 and 302, and to be unduly preferential of intrastate traffic and shippers and of localities, within the State, unduly prejudicial to interstate traffic and shippers and to localities outside the States, unduly, unjustly and unreasonably discriminatory against interstate commerce. Among other things, the Commission stated: "Upon this record, we find no conditions within Illinois so different from those affecting interstate traffic to justify the present differences in rates. Illinois intrastate traffic is not contributing its just proportion of the revenues of the carriers, measured by the statutory rate of return '*upon the aggregate value of the railway property of such carriers held for and used in the service of transportation.*'"

In the case of *Railroad Commission of Wisconsin v. Chicago B. & Q. Rd. Co.*<sup>5</sup> the United States Supreme Court held as follows:

1. That a showing that intrastate passenger fares work an undue discrimination against travelers in interstate commerce and against localities in typical instances numerous enough to justify a finding against a large class of fares is not sufficient evidence of discrimination against persons and localities, within the meaning of the Transportation Act of February 28, 1920, to justify a state-wide order of the Interstate Commerce Commission making a horizontal increase of all intrastate passenger fares to correspond with interstate rates, where it is clear that such order will include many rates not within the proper class, or the reason of the order; and a saving clause by which exceptions are permitted cannot give the order validity.

2. That intrastate passenger fares fixed by state authority, which, if maintained, will reduce the net income of the interstate carriers of the state millions of dollars below what it would be under intrastate fares on the same level with interstate rates, constitute an "undue, unreasonable, and unjust discrimination against interstate or foreign commerce," within the meaning of the Transportation Act of February 28, 1920, which the Interstate Commerce Commission may remove by a state-wide order making a horizontal increase of all intrastate passenger fares to correspond with interstate rates, in the exercise of its authority under that section to remove any such discrimination, and, under Section 422, to prescribe just and reasonable rates which shall yield a fair return upon the aggregate value of the railway property used in transportation, to the end that an adequate railway service be maintained for the people of the United States;

3. That the aggregate value of the railway property of interstate carriers used in transportation, which, under the Transportation Act of

February 28, 1920, the Interstate Commerce Commission is to make the basis of the just and reasonable rates which it is its duty to prescribe, is not confined to that part of the property and equipment of the carrier which is used in interstate commerce, and the Commission is not charged with the duty of separating the property used in intrastate and interstate commerce;

4. That orders of the Interstate Commerce Commission which, in order to remove a discrimination against interstate commerce, involved in a general disparity between intrastate and interstate passenger rates of interstate carriers, raise the intrastate rates to correspond with the interstate rates, do not violate the specific proviso of the original Interstate Commerce Act of February 4, 1887, repeated in the amending acts, that the Commission is not to regulate traffic wholly within the state, since such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce, and necessary to its efficiency;

5. That committee reports and explanatory statements of members of Congress in charge, made in presenting a bill for passage, while a legitimate aid in the interpretation of a statute when its language is doubtful or obscure, cannot control such interpretation when, taking the act as a whole, the effect of the language used is clear to the court. Such aids are only admissible to solve doubt, and not to create it;

6. That Congress, in the exercise of its control over interstate commerce, could, as it did in the Transportation Act of February 28, 1920, empower the Interstate Commerce Commission to remove a discrimination against interstate commerce involved in a general disparity between intrastate and interstate passenger rates by ordering a state-wide increase of intrastate rates to correspond with the interstate rates;

7. That in developing interstate commerce agencies Congress can impose any reasonable condition on a state's use of interstate carriers for intrastate commerce that it deems necessary or desirable;

8. That the action of the Interstate Commerce Commission in removing, under the Transportation Act of February 28, 1920, a discrimination against interstate commerce involved in a general disparity between interstate and intrastate rates, by ordering an increase in the latter to correspond with the interstate rates, should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate as between themselves, on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce.

Following is a statement of the case and opinion of the Court delivered by Mr. Chief Justice Taft:

"The proceedings out of which this case has grown, known as the *Wisconsin Passenger Fares*, began in an investigation by the Interstate Commerce Commission, under §§ 3 and 4 of § 13 of the Interstate Commerce Act, as amended by § 416 of the Transportation Act of February 28, 1920, into alleged undue and unreasonable discrimination against interstate commerce arising out of intrastate railroad rates in Wisconsin. The interstate carriers by steam railroad of the state

were made respondents, and the governor and State Railroad Commission were duly notified. The Interstate Commerce Commission made its report and order November 27, 1920. *Wisconsin Passenger Fares*, 59 Inters. Com. Rep. 391.

"The Commission had investigated the interstate rates of carriers in the United States, in a proceeding known as *Ex parte 74, Increased Rates*, 58 Inters. Com. Rep. 220, for the purpose of complying with § 15a of the Interstate Commerce Act, as amended by § 422 of the Transportation Act of 1920. That section requires that the Commission so adjust rates that the revenues of the carriers shall enable them as a whole or by groups to earn a fixed net income on their railway property. The Commission ordered an increase for the carriers in the group of which the Wisconsin carriers were a part, of 35 per cent in interstate freight rates, and 20 per cent in interstate passenger fares and excess baggage charges, and a surcharge upon passengers in sleeping cars amounting to 50 per cent of the charge for space in such cars, to accrue to the rail carriers. Thereupon the carriers applied to the Wisconsin Railroad Commission for corresponding increases in intrastate rates. The state commission granted increases in intrastate freight rates of 35 per cent, but denied any in intrastate passenger fares and charges on the sole ground that a state statute prescribed a maximum for passengers of 2 cents a mile.

"In the *Wisconsin Passenger Fares*, the Interstate Commerce Commission found that all of the respondent carriers of Wisconsin transported both intrastate and interstate passengers on the same train, with the same service and the same accommodations; that the state passenger, paying a lower rate, rode on the same train, in the same car, and perhaps in the same seat with the interstate passenger, who paid the higher rate; that the circumstances and conditions were substantially similar for interstate as for intrastate passenger service in Wisconsin; that travelers destined to, or coming from, points outside the state, found it cheaper to pay the intrastate fare within Wisconsin and the interstate fare beyond the border than to pay the through interstate fare; that undue preference and prejudice were shown by the falling off of sales of tickets from border-line points in Minnesota and Michigan to stations in Wisconsin, and by a marked increase in sales of local tickets from corresponding border-line points in Wisconsin to stations in Wisconsin; that the evidence as to the practice with respect to passenger fares applied in like manner to the surcharge upon passengers in sleeping and parlor cars and to excess baggage charges.

"The Commission further found that the fare necessary to fulfill the requirement as to net income of this interstate railroad group under § 15a was 3.6 cents per mile, and that this was reasonable, that the direct revenue loss to the Wisconsin carriers, due to their failure to secure the 20 per cent increase in intrastate fares, would approximate \$2,400,000 per year if the 3-cent fare fixed by the President under Federal war control were continued, and \$6,000,000 per year if the 2-cent fare named in the state statute should become effective.

"The Commission found that there was undue, unreasonable, and unjust discrimination against persons traveling in interstate commerce, and against interstate commerce as a whole; and ordered that the

undue discrimination should be removed by increases in all intrastate passenger fares and excess baggage charges, and by surcharges corresponding with the increases and surcharges ordered in interstate business.

"The order was made without prejudice to the right of the authorities of the state or of any other party in interest to apply in the proper manner for a modification of the order as to any specified intrastate fares or charges if the latter were not related to the interstate fares or charges in such a way as to contravene the provisions of the Interstate Commerce Act.

"The carriers filed bills in equity, of which the present is one, in the district court, to enjoin the State Railroad Commission and other state officials from interfering with the maintenance of the fares thus ordered and published.

"Application for interlocutory injunction was made to the district court under § 266 of the Judicial Code. After a hearing before three judges, they granted an interlocutory injunction, from which this appeal was taken.

"The Commission's order, interference with which was enjoined by the district court, effects the removal of the unjust discrimination found to exist against persons in interstate commerce, and against interstate commerce, by fixing a minimum for intrastate passenger fares in Wisconsin at 3.6 cents per mile per passenger. This is done under § 4 of § 13 of the Interstate Commerce Act, as amended by the Transportation Act of 1920, which authorizes the Interstate Commerce Commission, after a prescribed investigation, to remove

"Any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce.

"We have two questions to decide.

"First. Do the intrastate passenger fares work undue prejudice against persons in interstate commerce, such as to justify a horizontal increase of them all?

"Second. Are these intrastate fares an undue discrimination against interstate commerce as a whole which it is the duty of the Commission to remove?

"We shall consider these in their order.

"First. The report and findings of the Commission undoubtedly show that the intrastate fares work an undue discrimination against travelers in interstate commerce and against localities (*Houston E. & W. T. R. Co. v. United States*, 234 U. S. 342, 58 L. ed. 1341, 34 Sup. Ct. Rep. 833) in typical instances numerous enough to justify a general finding against a large class of fares. In a general order thus supported, possible injustice can be avoided by a saving clause allowing anyone to except himself from the order by proper showing. This practice is fully sustained by precedent in what was done as a sequence of the Shreveport Case (*Houston, E. & W. T. R. Co. v. United States*,

*supra*). Sec. 34, Inters. Com. Rep. 472; 41 Inters. Com. Rep. 83; *Eastern Texas R. Co. v. Railroad Commission*, P. U. R. 1917F, 554, 242 Fed. 300; *Looney v. Eastern Texas R. Co.* 247 U. S. 214, 62 L. ed. 1084, 38 Sup. Ct. Rep. 460. In *Illinois C. R. Co. v. Public Utilities Commission*, 245 U. S. 493, 508, 62 L. ed. 425, 437, P. U. R. 1918C, 1279, 38 Sup. Ct. Rep. 170, this court indicated its approval of such practice, which was adopted by the Commission. *Business Men's League v. Atchison, T. & S. F. R. Co.* 49 Inters. Com. Rep. 713. Any rule which would require specific proof of discrimination as to each fare or rate and its effect would completely block the remedial purpose of the statute.

"The order in this case, however, is much wider than the orders made in the proceedings following the *Shreveport* and *Illinois C. R. Co. Cases*. There, as here, the report of the Commission showed discrimination against persons and localities at border points, and the orders were extended to include all rates or fares from all points, in the state to border points. But this order is not so restricted. It includes fares between all interior points, although neither may be near the border, and the fares between them may not work a discrimination against interstate travelers at all. Nothing in the precedents cited justifies an order affecting all rates of a general description when it is clear that this would include many rates not within the proper class or the reason of the order. In such a case, the saving clause by which exceptions are permitted cannot give the order validity. As said by this court in the *Illinois Central R. Co. Case*, "It is obvious that an order of a subordinate agency, such as the Commission, should not be given a precedence over a state rate statute, otherwise valid, unless, and except so far as, it conforms to a high standard of certainty." See also *American Exp. Co. v. South Dakota*, 244 U. S. 617, 627, 61 L. ed. 1352, 1359, P. U. R. 1917F, 45, 37 Sup. Ct. Rep. 656.

"If, in view of the changes, made by Federal authority, in a large class of discriminating state rates, it is necessary from a state point of view to change nondiscriminating state rates to harmonize with them, only the state authorities can produce such harmony. We cannot sustain the sweep of the order in this case on the showing of discriminations against persons or places alone.

"Second. The report of the Commission shows that if the intrastate passenger fares in Wisconsin are to be limited by the statute of that state to 2 cents per mile, and charges for extra baggage and sleeping car accommodations are to be reduced in a corresponding degree, the net income of the interstate carriers of the state will be cut six millions of dollars below what it would be under intrastate rates on the same level with interstate rates. Under ¶¶ 3 and 4 of § 13 and § 15a, as enacted in §§ 416 and 422, respectively, of the Transportation Act of 1920 \* \* \* are such reductions and disparity an "undue, unreasonable, and unjust discrimination against interstate or foreign commerce" which the Interstate Commerce Commission may remove by raising the intrastate fares? A short reference to the circumstances inducing the legislation, and a summary of its relevant provisions, will aid the answer to this question.

"The Interstate Commerce Act of February 4, 1887, was enacted by Congress to prevent interstate railroad carriers from charging un-

reasonable rates and from unjustly discriminating between persons and localities. The railroads availed themselves of the weakness and cumbrous machinery of the original law to defeat its purpose, and this led to various amendments, culminating in the amending Act of June 18, 1910, in which the authority of the Commission in dealing with the carriers was made summary and effectively complete. Whatever the causes, the fact was that the carrying capacity of the railroads did not thereafter develop proportionately with the growth of the country, and it became difficult for them to secure additional investment of capital on feasible terms. When the extraordinary demand for transportation arose in 1917, the Congress and the President concluded to take over all the railroads into the management of the Federal government, and by joint use of facilities, which the Anti-Trust Law was thought to forbid under private management, and by use of government credit, to increase their effectiveness. This was done by appropriate legislation and Executive action under the war power. From January 1, 1918, until March 1, 1920, when the Transportation Act went into effect, the common carriers by steam railroad of the country were operated by the Federal government. Due to the rapid rise in the prices of material and labor in 1918 and 1919, the expense of their operation had enormously increased by the time it was proposed to return the railroads to their owners. The owners insisted that their properties could not be turned back to them by the government for useful operation without provision to aid them to meet a situation in which they were likely to face a demoralizing lack of credit and income. Congress acquiesced in this view. The Transportation Act of 1920 was the result. It was adopted after elaborate investigations by the Interstate Commerce Committees of the two Houses.

"Under title 2 it made provision for the termination of Federal control March 1, 1920, for the refunding of the carriers' indebtedness to the United States, and for a guaranty for six months to the carriers of an income equal to the wartime rental for their properties, and directed that for two years following the termination of Federal control, the Secretary of the Treasury, upon certificate of the Commission, might make loans to the carriers not exceeding the maximum amount recommended in the certificate, out of a revolving fund of \$300,000,000.

"Under title 4, amendments were made to the Interstate Commerce Act which included § 13, §§3 and 4, and § 15a, already quoted in the margin. The former for the first time authorizes the Commission to deal directly with intrastate rates where they are unduly discriminating against interstate commerce,—a power already indirectly exercised as to persons and localities, with approval of this court, in the Shreveport and other cases. The latter, the most novel and most important feature of the act, requires the Commission so to prescribe rates as to enable the carriers as a whole, or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of the railway property used in transportation. For two years, the return is to be 5½ per cent, with ½ per cent for improvements, and thereafter is to be fixed by the Commission.

"The act sought to avoid excessive incomes accruing, under the operation of § 15a, to the carriers better circumstanced, by using the

excess for loans to the others and for other purposes. The act further put under the control of the Interstate Commerce Commission, 1st, the issuing of future railroad securities by the interstate carriers; 2d, the regulation of their car supply and distribution and the joint use of terminals; and, 3d, their construction of new lines, and their abandonment of old lines. The validity of some of these provisions has been questioned. Upon that we express no opinion. We only refer to them to show the scope of the congressional purpose of the act.

"It is manifest from this very condensed recital that the act made a new departure. Therefore the control which Congress, through the Interstate Commerce Commission, exercised, was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered, and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in § 15a to be one of the purposes of the bill:

"Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. Twenty per cent of the gross freight receipts of the railroads of the country are from intrastate traffic, and 50 per cent of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. Section 15a confers no power on the Commission to deal with the intrastate rates. What is done under that section is to be done by the Commission 'in the exercise of its powers to prescribe just and reasonable rates;' i. e., powers derived from previous amendments to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates. When we turn to ¶ 4, § 13, however, and find the Commission for the first time vested with a direct power to remove 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce,' it is impossible to escape the dovetail relation between that provision and the purpose of § 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an 'undue, unreasonable, and unjust discrimination against interstate or foreign commerce,' within the ordinary meaning of those words.

"Counsel for appellants, not able to satisfy their meaning by the suggestion of any other discrimination to which they apply, are forced to the position that the words are tautological and a mere repetition

of any undue or unreasonable advantage, preference or prejudice as between persons and localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, which precede them. In view of their apt application to the most important purpose of the legislation, we are not at liberty to take such a view. If 'undue, unreasonable and unjust discrimination against interstate or foreign commerce' are tautological, why are they followed by the phrase 'which is hereby prohibited and declared to be unlawful?' To accompany a meaningless phrase with words of such special emphasis would be unusual.

"It is urged that in previous decisions, notably the *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 352, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, the *Shreveport Case*, 234 U. S. 342, 58 L. ed. 1341, 34 Sup. Ct. Rep. 833, *supra*, and the *Illinois C. R. Co.* Case, 245 U. S. 493, 62 L. ed. 425, P. U. R. 1918C, 1279, 38 Sup. Ct. Rep. 170, *supra*, the expression unjust discrimination against interstate commerce was often used when, as the law then was, it could only mean discrimination as between persons and localities, and therefore that it is to be given the same limited meaning here. But, here, the general words are used after discrimination against persons and localities have been specifically mentioned. The natural inference is that, even if they include what has gone before, they mean something more. When we find that they aptly include a kind of discrimination against interstate commerce which the operation of the new act for the first time makes important, and which would seriously obstruct its chief purpose, we cannot ignore their necessary effect.

"Counsel for appellants are driven by the logic of their position to maintain that the valuation required for the purposes of § 15a to be ascertained pursuant to § 19a of the Interstate Commerce Act (March 1, 1913, 37 Stat. at L. 701, chap. 92, Comp. Stat. § 8591, 4 Fed. Stat. Anno. 2d ed. p. 495; amended February 28, 1920, 41 Stat. at L. 493, chap. 91) is to be only of that part of the property and equipment of the Interstate carriers which is used in commerce among the states, and must be segregated from that used in intrastate commerce. This is contrary to the construction which, since the enactment of § 19a, March 1, 1913, the Commission has put upon that section in carrying out its injunction. It is inadmissible. The language of § 15a, refutes such interpretation. The percentage is to be calculated on 'the aggregate value of the railway property of such carriers held for and used in the service of transportation.' To impose on the Commission the duty of separating property used in the two services when so much of it is used in both, and to do this in a reasonably short time for practical use, as contemplated by the statute, would be to assign it a well-nigh impossible task. This, of itself, prevents our giving the words such a construction unless they clearly require it. They certainly do not.

"It is objected here, as it was in the *Shreveport Case*, that orders of the Commission which raise the intrastate rates to a level of the interstate structure violate the specific proviso of the original Interstate Commerce Act, repeated in the amending acts, that the Commission is not to regulate traffic wholly within a state. To this the same answer must be made as was made in the *Shreveport Case* (234 U. S. 342, 358, 58 L. ed. 1341, 1351, 34 Sup. Ct. Rep. 833), that such orders as to intra-

state traffic are merely incidental to the regulation of interstate commerce, and necessary to its efficiency. Effective control of the one must embrace some control over the other, in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the nation, cannot exercise complete, effective control over interstate commerce without incidental regulation or intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso.

"Great stress is put on the legislative history of the Transportation Act to show that the bill was not intended to confer on the Commission power to remove any discrimination against interstate commerce involved in a general disparity between interstate and intrastate rates. Committee reports and explanatory statements of members in charge, made in presenting a bill for passage, have been held to be a legitimate aid to the interpretation of a statute where its language is doubtful or obscure. *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 475, 65 L. ed. 354, 16 A. L. R. 196, 41 Sup. Ct. Rep. 172. But when, taking the act as a whole, the effect of the language used is clear to the court, extraneous aid like this cannot control the interpretation. *Pennsylvania R. Co. v. International Coal Min. Co.* 230 U. S. 184, 198, 57 L. ed. 1446, 1451, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315; *Caminetto v. United States*, 242 U. S. 470, 490, 61 L. ed. 442, 455, L. R. A. 1917F, 502, 37 Sup. Ct. Rep. 192, Ann. Cas. 1917B, 1168. Such aids are only admissible to solve doubt, and not to create it. For the reasons given, we have no doubt in this case.

"Counsel for the appellants have not contested the constitutional validity of the statute, construed as we have construed it, although the counsel for the state commissions, whom we permitted to file briefs as amici curiae, have done so. The principles laid down by this court in the *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 352, 432, 433, 57 L. ed. 1511, 1555, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18, the *Shreveport Case*, 234 U. S. 342, 351, 58 L. ed. 1341, 1348, 34 Sup. Ct. Rep. 833, and the *Illinois C. R. Co. Case*, 245 U. S. 493, 506, 62 L. ed. 425, 437, P. U. R. 1918C, 1279, 38 Sup. Ct. Rep. 170, which are rate cases, and in the analogous cases of *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 618, 55 L. ed. 878, 882, 31 Sup. Ct. Rep. 621; *Southern R. Co. v. United States*, 222 U. S. 20, 26, 27, 56 L. ed. 72, 74, 75, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822; *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 48, 51, 56 L. ed. 327, 345, 347, 38 L. R. A. (N. S.) 44, 32, Sup. Ct. Rep. 169, 1 N. C. C. A. 875, we think, leave no room for discussion on this point. Congress, in its control of its interstate commerce system, is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonably compensatory return for all the work it does. The states are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably

proportionate to that for the interstate business. Congress, as the dominant controller of interstate commerce, may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear. *Wilson v. Shaw*, 204 U. S. 24, 51 L. ed. 351, 27 Sup. Ct. Rep. 233; *Luxton v. North River Bridge Co.* 153 U. S. 525, 38 L. ed. 808, 14 Sup. Ct. Rep. 891; *California v. Central P. R. Co.* 127 U. S. 1, 39, 32 L. ed. 150, 157, 2. Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073. In such development, it can impose any reasonable condition on a state's use of interstate carriers for intrastate commerce it deems necessary or desirable. This is because of the supremacy of the national power in this field.

"In *Minnesota Rate Cases*, 230 U. S. supra, where relevant cases were carefully reviewed, it was said, p. 399: The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the nation may deal with the internal concerns of the state, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. The conclusion necessarily results from the supremacy of the national power within its appointed sphere.

"It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce.

"It may well turn out that the effect of a general order in increasing all rates, like the one at bar, will, in particular localities, reduce income instead of increasing it, by discouraging patronage. Such cases would be within the saving clause of the order herein, and make proper an application to the Interstate Commerce Commission for appropriate exception. So, too, in practice, when the state commissions shall recognize their obligation to maintain a proportionate and equitable share of the income of the carriers from intrastate rates, conference between the Interstate Commerce Commission and the state commissions may dispense with the necessity for any rigid Federal order as to the intrastate rates, and leave to the state commissions power to deal with them and increase them or reduce them in their discretion.

"The order of the District Court, granting the interlocutory injunction, is affirmed."

In the case of *State of New York, et al. v. United States, et al.*<sup>6</sup> the United States Supreme Court, per Mr. Chief Justice Taft, stated:

"This was a bill in equity against the United States and the Interstate Commerce Commission and others, brought by the state of New York and its attorney general, to annul and enjoin the enforcement of an order of the Interstate Commerce Commission, requiring the interstate railroads operating in intrastate commerce in the state of New York to charge in such commerce 3.6 cents a mile for all passengers, 20 per cent increase over the then excess baggage rates to intrastate passengers, a surcharge of 50 per cent of the charges for space in sleeping cars to such passengers, and 20 per cent increase in intrastate rates on milk, all for the purpose of bringing the intrastate rates to the level of the interstate rates previously fixed by the Commission. The bill was filed under and by virtue of the statute repealing the Commerce Court Act and conferring jurisdiction on the district court. October 22, 1913, 38 Stat. at L. 219, chap. 32. The application for an interlocutory injunction was heard by a circuit judge and two district judges. Then a final hearing was had, and the court entered a final decree dismissing the complaint, from which this appeal has been taken. The railroad companies affected by the order were, on their petition, permitted to intervene, and are here as appellees.

"It appears from the record that, in the proceeding by the Interstate Commerce Commission to fix interstate commerce rates, to comply with the requirements of § 15a of the Transportation Act of February 28, 1920, (41 Stat. at L. 488, chap. 91),—a proceeding known as *Ex parte 74, Increased Rates*, 58 Inters. Com. Rep. 220,—the Commission, after conference with a committee representing all the state commerce commissions and authorities, directed the group of interstate railroads, of which the railroads operating in New York were a part, to raise their freight rates 35 per cent, their passenger rates and excess baggage charges 20 per cent, and to add a surcharge of 50 per cent for passengers on sleeping cars. As soon as the order in *Ex parte 74* was made, the railroads concerned applied to the Public Service Commission of the State of New York for similar increases in intrastate rates. That commission granted the increase in freight rates, but denied it as to milk and passenger fares. The passenger intrastate fares were 3 cents a mile under the order of the President during the war control, but when that should become ineffective, a statute of New York, fixing passenger fares on the New York Central Railroad from Albany to Buffalo at 2 cents a mile, would come into force and operation. As soon as the state commission made its ruling, the railroads applied to the Interstate Commerce Commission under § 13, of which proceeding notice was given to the state of New York, the attorney general, and the Public Service Commission, all of whom appeared, for an order directing the railroads to put intrastate passenger fares, excess baggage charges, sleeping car surtaxes, and milk rates on the same level with interstate rates. Proof was offered by the railroads to show that conditions of operation in state and interstate passenger traffic were alike, and there was no showing otherwise. The record in *Ex parte 74* was put in evidence. There was evidence also to show that at Buffalo and other border points the difference between the interstate and intrastate fares would divert business from the interstate lines between New

York city and Buffalo to the New York Central lines, and that the same difference would break up interstate journeys to the West into intra-state journeys to Buffalo from New York, and an interstate journey beyond, thus reducing interstate travel and discriminating against passengers carried therein. Evidence was adduced to show the injury to interstate business in the transportation of milk from the country to New York city from points outside of the state, in competition with intrastate traffic in this necessity of life. No investigation was made into suburban commuter travel, and it is excluded by the Commission from the scope of the order which it made. The order was state-wide in its effect, and required all interstate carriers to bring their intra-state passenger fares, except commuters' rates, excess baggage charges, and sleeping car surcharges to a level with interstate fares and rates, as ordered in *Ex parte 74*. The Commission introduced a saving clause in its findings by which the New York authorities or any other interested parties were given leave to apply for modification of its order or findings as to any intrastate fares, charges or rates included therein, on the ground that the latter were not related to interstate fares, charges or rates in such a way as to contravene the provisions of the Interstate Commerce Act. Under this clause, at least one petition has been filed by a railroad, and the railroad excepted from the order.

"The district court dismissed the bill.

"This case differs from the *Wisconsin Rate Case* just decided [— U. S. —, ante, 236, 42 Sup. Ct. Rep. —], in that it is a direct proceeding to annul or set aside the order of the Interstate Commerce Commission complained of, brought against the United States and the Commission under the statute. *Skinner & E. Corp. v. United States*, 249 U. S. 557, 63 L. ed. 772, 39 Sup. Ct. Rep. 375. The *Wisconsin Case* was a suit by a railroad against the state authorities to prevent the latter from penalizing the railroad for complying with the order of the Commission. To this suit the United States and the Commission were not parties. The defense of the state authorities was a collateral attack upon the order, to prevail in which, they were obliged to show that the order was void on the face of the findings without regard to the evidence or the absence of it. In the case before us, the complainants are entitled to rely on the absence of any substantial evidence to sustain a material finding as a basis for attacking the order.

"The first objection of the appellants is that there was not sufficient evidence of discrimination against persons and localities under § 13, ¶ 4, § 416 of the Transportation Act of 1920, to justify a state-wide order of the kind here made. We have considered this objection in the *Wisconsin Case* on a similar showing on the findings. Here we consider it on the evidence. We reach the same conclusion here and sustain the objection.

"The next objection is that the state has a charter contract with the New York Central Railway Company by which the latter is bound not to charge more than 2 cents a mile for passenger carriage between Albany and Buffalo, and that if the Transportation Act permits the Interstate Commerce Commission, by such an order, to enable the railroad company to violate its contract, it impairs the obligation of a contract, in violation of § 10, article 1, of the Federal Constitution.

That section provides a law that no 'state shall . . . pass a law . . . impairing the obligation of the contracts,' and does not in terms restrict Congress or the United States. But it is said that it deprives New York and her people of property without due process of the law. We said in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 230, 44 L. ed. 136, 143, 20 Sup. Ct. Rep. 96: 'Anything which directly obstructs and thus regulates that commerce which is carried on among the states, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce.' *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 34 L. R. A. (N. S.) 671, 31 Sup. Ct. Rep. 265. See also *Scranton v. Wheeler*, 179 U. S. 141, 162, 163, 45 L. ed. 126, 137, 21 Sup. Ct. Rep. 48; *Union Bridge Co. v. United States*, 204 U. S. 364, 400, 51 L. ed. 523, 539, 27 Sup. Ct. Rep. 367.

"The main objections to the order are the same as those presented, considered, and overruled in the Wisconsin Rate Case, just decided. The evidence in this case shows that if the passenger and other rates here in controversy were to continue in force as ruled by the Public Service Commission of New York, the annual gross revenues of the interstate railroads operating in the state of New York from both interstate and intrastate passenger and milk business would be less, by nearly twelve millions of dollars, than those revenues if the intrastate fares and rates were on the same level as the interstate rates, as fixed by the Interstate Commerce Commission. If the lower level of intrastate fares and rates is to be maintained, it will discriminate against interstate commerce, in that it will require higher fares and rates in the interstate commerce of the state to secure the income for which the Interstate Commerce Commission must attempt to provide by fixing rates under § 15a of the Interstate Commerce Act, as amended by § 422 of the Transportation Act of 1920 (41 Stat. at L. 456, 488, chap. 91), in carrying out the declared congressional purpose 'to provide the people of the United States with adequate transportation.' As we have just held in the Wisconsin Case, this constitutes 'undue, unreasonable, and unjust discrimination against interstate commerce,' which is declared to be unlawful and prohibited by § 13, ¶ 4, of the Interstate Commerce Act, as amended by § 416 of the Transportation Act of 1920 (41 Stat. at L. 456, 484, chap. 91), and which the Interstate Commerce Commission is authorized therein to remove by fixing intrastate rates for the purpose. We need not repeat our reasons for our ruling. Nor need we consider and give again the grounds upon which we hold § 13, ¶ 4, as thus construed, to be valid under the Constitution of the United States.

"The decree of the District Court, dismissing the bill of complaint, is affirmed."

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1. Shreveport Cases: *Houston, East & West Texas Ry. Co. v. United States*, and *Texas & Pacific Ry. Co. v. United States* (1913), 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. Rep. 833; *Chicago, M. & St. P. Ry. Co. v. State Public Utilities Commission* (Ill., 1915), 108 N. E. 729, 731; *American Express Company v. State of South Dakota* (1917), 244 U. S. 657, 61 L. Ed. 1352, 37 Sup. Ct. Rep. 656. But see *Illinois C. Rd. Co. v. Public Utilities Commission of Illinois* (1917), 62 L. Ed. 425, 245 U. S. 493, 38 Sup. Ct. Rep. 170, wherein the Supreme Court held that an order of the Interstate Commerce Commission requiring a readjustment of intrastate rates prescribed by state authority, made for the purpose of removing a discrimination against interstate commerce found to result from a disparity between intrastate and interstate rates, is invalid for uncertainty where it has no definite field of operation and leaves uncertain the territory or points to which it applies.

2. In the Matter of Intrastate Rates within the State of Illinois (1920), 59 I. C. C. Rep. 350, et seq. The Commission, per Mr. Commissioner McChord, stated:

"This is a proceeding under the interstate commerce act to determine, among other things, whether the present passenger fares for intrastate travel in Illinois result in any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce; and if so, what fares or what maximum or minimum, or maximum and minimum, fares shall be prescribed to be charged to cure the situation. Similar questions relating to freight rates and other charges made by common carriers are also involved, but they are reserved for later determination, as the case has not yet been submitted as to them.

"In 1907 the legislature of the state of Illinois enacted a law providing, subject to certain qualifications, that on and after July 1 of that year it would be unlawful for any common carrier to charge for intrastate travel in that state a fare in excess of 2 cents per mile for adults and 1 cent per mile for children under 12 years of age.

"Except as to commutation fares, which were lower, this basis of charge was applied until June 10, 1918. On that date the Director General of Railroads provided by General Order No. 28 that the minimum fares, not including commutation fares, both state and interstate, throughout the country should be based on 3 cents per mile for adults and 1.5 cents per mile for children under 12 years. Commutation fares were increased 10 per cent by that order. This action, of course, superseded the state law, and the figures named became the recognized basis of charge. Later, by Sec. 208 (a)<sup>3</sup> of the transportation act, 1920, Congress provided, subject to certain qualifications, that all rates, fares and charges in effect on February 29, 1920, should continue in effect until September 1, 1920.

"In Ex Parte 74, *Increased Rates, 1920*, 58 I. C. C., 220 and 302, we authorized substantial increases in the charges for freight and passenger service of common carriers subject to our jurisdiction throughout the country, concluding that such increases would, under the existing conditions, result in rates, fares, and charges 'not unreasonable in the aggregate under section 1 of the act and would enable the carriers \* \* \* under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, to earn an aggregate annual railway operating income equal, as nearly as may be, to a return of 5½ per cent upon the aggregate value, for the purposes of this proceeding, of the railway property of such carriers held for and used in the service of transportation and ½ of 1 per cent in addition.' We decided that the carriers might increase their passenger fares and charges 20 per cent, the term passenger fares including standard local or interline fares; excursion, convention and other fares for special occasions; commutation and other multiple forms of tickets; extra fares on limited trains; and club-car charges. Also, that a surcharge upon passengers in sleeping and parlor cars might be made, amounting to 50 per cent of the charge for space in such cars, such charge to be collected in connection with the charge for space and to accrue to the rail carriers. These increased charges were established by the carriers, interstate, effective August 26, 1920.

"In the meantime the carriers operating in the state of Illinois had applied to the Public Utilities Commission of that state for like increases in their intrastate rates, fares and charges. In a decision rendered August 10, 1920, the Illinois commission allowed no increases in passenger fares, holding that they had no jurisdiction to authorize fares in excess of those prescribed by the statute, and that the statute, though temporarily in state of suspense, was still in existence and would again become operative September 1, 1920. Accordingly, the commission ordered that, effective that date, the existing schedules of passenger fares for intrastate travel be canceled, the effect of which would have been the reestablishment of the statutory fares. The commission also did not authorize increases in commutation and excursion fares, and other charges for passenger travel, except excess baggage rates, on which increases of 20 per cent were authorized. Increases in the charges for freight service were authorized less than those allowed by us, but this matter, as previously indicated, will be dealt with separately.

"The Illinois carriers at once applied to the United States District Court for the Northern District of Illinois, Eastern Division, for an injunction against the enforcement of the statute. The court, upon preliminary hearing, August 24, took the position that the statutory fares could probably be shown to be confiscatory, and accordingly granted an interlocutory injunction restraining the enforcement of the statute and otherwise preserving the *status quo* until the matter could be fully heard and the law questions determined by the court.

"Promptly after the issuance of the Illinois commission's decision the steam railroads of the state subject to our jurisdiction and the Chicago, Lake Shore & South Bend Railway Company, an interstate electric line, filed a petition under section 13 of the interstate commerce act, complaining of the action of that commission and alleging that the resulting intrastate rates, fares, and charges would be productive of undue prejudice and unjust discrimination, and asking for an investigation of the matter. We thereupon instituted this proceeding and assigned it for hearing, giving the Governor of Illinois and the Illinois commission due notice. The receiver of the Aurora, Elgin & Chicago Railroad Company, an electric line, intervened and asked that, as to its third rail division, from Chicago to Batavia and Aurora, that company be included in any relief granted the petitioners.

"All the carriers in Illinois are engaged in the handling of both state and interstate passengers and such passengers are carried on the same trains.

"Evidence offered by the carriers indicates that, if the present intrastate rates are continued for one year and there is the same intrastate passenger travel during that year was in the calendar year 1919, the loss to the carriers, due to their failure to secure the 20 per cent increase in intrastate fares, will approximate \$7,000,000, and if the 2-cent intrastate fare should become effective the loss would be \$15,000,000.

"Near the borders of the state of Illinois are such points as St. Louis and Hannibal, Mo.; Keokuk, Davenport, Muscatine, Burlington, Dubuque and Clinton, Iowa; Beloit, Janesville, Madison and Milwaukee, Wis.; Gary, Indiana Harbor, Hammond, Whiting, La Fayette, Terre Haute and Evansville, Ind.; and Paducah, Ky. All such points are in constant competition, more or less, with cities in Illinois for population, industrial development and business growth. The record affords examples of how the lower fares in Illinois affect these localities, and also interstate travelers.

"Quincy, Ill., is in keen competition with Burlington and Keokuk, Iowa. A branch line of the Chicago, Burlington & Quincy Railroad runs between Burlington and Quincy. Trains leave both points in the forenoon and return in the afternoon, carrying people from Quincy and Burlington out into country to sell goods and also carrying the country people into Quincy and Burlington to buy goods. The time of the trains is fixed so that Quincy and Burlington are on an approximate equality as to service, but passengers to and from Quincy ride on a basis of 3 cents per mile, while those to and from Burlington pay 20 per cent more, or on a basis of 3.6 cents per mile. Danville, Ill., has a country trade coming into it from Indiana for distances of perhaps as much as 50 miles. Illinois people also come into Danville to trade. Those from Illinois pay the lower fare. Chicago competes with St. Louis, Evansville and Paducah in doing business in interior Illinois. Passengers to and from Chicago, of course, have an advantage in fares over the other points. These instances are given of record as typical. Similar situations may be found all around the borders of the state. In *Illinois Classification*, 55 I. C. C., 290, which was a proceeding instituted by us under section 8 of the Federal control act upon request of the Director General for advice, and which involved the question of discrimination as against Indiana and in favor of Illinois in the matter of freight rates, it appeared that Indiana jobbers were shipping, or seeking to ship, into Illinois in competition with Illinois industries, but that they were confronted with relatively higher rates than were paid by their Illinois competitors to points in the same state. With regard to the competition we said:

"'Jobbers and manufacturers of many different articles at Indianapolis, Terre Haute, LaFayette, LaPorte, Fort Wayne, and other points in Indiana and at Louisville, Ky., distribute in less than carloads to points in Illinois. In so doing they must sell against competitors located at Chicago, Peoria, Bloomington, and other points in Illinois, and also at St. Louis, Mo., which is accorded substantially the Illinois scale of rates. To successfully meet the competition of those who enjoy the Illinois rates the Indiana shippers must in many instances absorb the differences in freight rates. Some have noticed a substantial falling off in business done by them in Illinois, although their business in other directions has increased; and the evidence strongly indicates that to a considerable extent the loss has been due to the freight rate situation. Especially is this true of the heavier and lower grade articles as to which the freight rates constitute a large proportion of the delivered value. Perhaps most of the business done by the Indiana shippers in Illinois is along the eastern border, but there is also a substantial amount done to some of them throughout the state. What we have said has particular reference to less-than-carload traffic moved at class rates. However, as to carload traffic also, some examples were cited wherein the existing rate situation operates to the disadvantage of Indiana shippers. Such instances generally arise out of commodity rates and minimum weights rather than out of differences in carload ratings and class rates.'

"As is commonly known, jobbers send their salesmen to visit the trade. Those in Illinois pay the lower basis of charge. That the differences referred to are injurious to those who must pay the higher fares is obvious.

"Just across the river from Rock Island, Ill., is Davenport, Iowa. The total railroad and sleeping car fare from Chicago to Rock Island is \$8.04, and from Chicago to Davenport \$10.36. The difference of \$2.32 against Davenport is not due to the light additional haul incurred in crossing the bridge between the two cities, but is in the main the result of the failure of the Illinois authorities to permit the same basis of charge as we have fixed. Passengers for Davenport are carried in the same train and by the same railroad as those for Rock Island. The train carries one sleeping car which runs to Rock Island and another which goes across to Davenport. Passengers to Rock Island pay on the basis of the intrastate fare of 3 cents per mile, plus the intrastate sleeping car fare, without a surcharge, plus 8 per cent war tax; while passengers to Davenport pay on the basis of 3.6 cents per mile, plus a sleeping car fare the same as is charged to Rock Island, but with a surcharge for sleeping car accommodations, plus the war tax of 8 per cent on the greater total fare. Except for the crossing of the bridge, as previously indicated, there is no difference in the character of the service. Until the increases in interstate fares became effective August 26 both cars were equally well patronized, but since that date passengers for Davenport ride to Rock Island and walk across the bridge. No one familiar with the conditions buys a ticket to Davenport or rides in the Davenport car unless the Rock Island car is full. Situations almost identical with that described above are found as be-

tween St. Louis, Mo., and East St. Louis, Ill., and as between Paducah, Ky., and Metropolis, Ill., and it is testified that there are other instances. Any incidental benefits that may accrue to an Illinois point, like Rock Island, by reason of having passengers leave their trains at such points rather than at the interstate point, their real destination would be at the expense and to the detriment of that interstate point. Davenport and Rock Island are in competition with each other for local retail and perhaps some wholesale trade in Illinois, Iowa and Missouri. Moreover, by reason of these disparities intrastate passenger traffic increases and interstate passenger traffic decreases. The result is increased intrastate and decreased interstate revenues, or, otherwise expressed, based on the number of passengers carried, is equivalent to a decreased intrastate operating cost at the expense of the interstate service.

"There is reason to believe that in general, measured per passenger carried, it cost more to handle the intrastate than the interstate traffic. The interstate passenger is generally a long-haul passenger, while the intrastate passenger generally goes a much shorter distance. It is testified that there is relatively the same amount of service for pick-up and delivery, for ticket sales, for accounting, etc., in connection with the intrastate traffic as there is in connection with interstate traffic. In other words, the terminal costs are about the same whether the passenger is intrastate or interstate. Coaches used in interstate traffic generally are in use at night as well as in the daytime, but the coaches used for intrastate movements are usually idle during the night. Although old and second-grade coaches are often used in intrastate traffic, which tends to reduce the cost, the density of the traffic is said to be much lighter. An intrastate coach is said ordinarily to carry fewer passengers and to make much less mileage than the average interstate coach.

"The record shows how the lower intrastate fares affect the revenue that should accrue from interstate traffic in another manner. Certain carriers between given points operate intrastate while others between the same points run interstate. Competition generally compels the maintenance of the same fares via all lines. The interstate carriers must either meet the Illinois intrastate fares or lose the traffic to lines within the state. In either event the total revenue from interstate traffic is adversely affected.

"The Illinois intrastate fares have the effect of otherwise reducing the earnings on interstate traffic, or rather on what would be interstate traffic if it were not for the differences in fares. Travelers destined to or coming from points outside the state find it cheaper to pay the intrastate fare within Illinois and the interstate fare beyond the border than to pay the through interstate fare. It is a common practice for travelers to buy their tickets to the state line, leave the train, immediately buy a ticket thence to destination, and then resume their journey on the same train. Technically they break their journey, making part of it intrastate, but practically they resort to a device which defeats the through fare. This practice is likely to result in delayed trains, especially when there are a number of people taking advantage of it. In addition, it may require the carriers to provide additional employees to sell tickets or receive fares. It may result in certain border points being favored as gateways unless the carriers via other routes reduce their charges to meet the situation. It is testified that the practice has had these results in other states in the past. Also that the practice has made it impossible in some parts of the country to maintain reasonable interstate fares; that is, the practice became such a nuisance that the carriers found it advisable to publish through fares based upon the factors to and from state borders. Principally as a matter of general interest, an instance was cited in which the authorities of one state went so far as to require the carriers to post notices at their stations to the effect that through fares could be defeated by resorting to the device above described.

"The state authorities take the position that we have no power to act with respect to intrastate rates or fares except to remove discriminations found to exist which injuriously affect persons or localities in interstate commerce. They urge that the evidence in this case does not warrant a finding that the fares generally throughout the state subject interstate commerce to unjust discrimination within the meaning of the statute.

"Section 3 of the act provides as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"This particular provision of the act stands unamended by the transportation act, 1920. It was this provision which gave rise to what is commonly known as the Shreveport doctrine, laid down by the Supreme Court in *Houston & Texas Ry. v. United States*, 234, U. S., 342, commonly known as the *Shreveport Case*. That case involved the validity of our order prescribing maximum reasonable rates from Shreveport, La., to points in Texas and requiring the removal of undue prejudice against Shreveport as to traffic to Texas points found to result from lower state commission-made rates from Dallas and Houston, Tex., toward Shreveport for equal distances. The Supreme court there said, p. 350 *et seq.*:

"It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several states. It is of the essence of this power

that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring "uniformity of regulation against conflicting and discriminating state legislation." By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control. *Gibbons v. Ogden*, 9 Wheat. 1, 196, 224; *Brown v. Maryland*, 12 Wheat. 419, 446; *County of Mobile v. Kimball*, 102 U. S. 691, 696, 697; *Smith v. Alabama*, 124 U. S. 45, 473; *Second Employers' Liability Cases*, 223 U. S. 1, 47, 53, 54; *Minnesota Rate Cases*, 230 U. S. 352, 398, 399.

"Congress is empowered to regulate, that is, to provide the law for the government of interstate commerce; to enact "all appropriate legislation" for its "protection and advancement" (The Daniel Ball, 10 Wall. 557, 564); to adopt measures "to promote its growth and insure its safety" (*County of Mobile v. Kimball*, *supra*); "to foster, protect, control and restrain" (*Second Employers' Liability Cases*, *supra*). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the matter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transaction of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would not be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field. *Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission*, 221 U. S. 612, 618; *Southern Railway Co. v. United States*, 222 U. S. 20, 26, 27; *Second Employers' Liability Cases*, *supra*, pp. 48, 51; *Interstate Commerce Commission v. Goodrich Transit Co.* 224 U. S. 194, 205, 213; *Minnesota Rates Cases*, *supra*, p. 431; *Illinois Central Railroad Co. v. Behrens*, 233 U. S. 473.

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"While these decisions (referring to cases cited) sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.

"This principle is applicable here. We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms. That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes an evil is undeniable; and where this evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention. Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a State may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden.

"It is also to be noted—as the Government has well said in its argument in support of the Commission's order—that the power to deal with the relation between the two kinds of rates, as a relation, lies exclusively with Congress. It is manifest that the State can not fix the relation of the carrier's interstate and intrastate charges without directly interfering with the former, unless it simply follows the standard set by Federal authority. This question was presented with respect to the long-and-short provisions of the Kentucky constitution, adopted in 1891, which the court had before it in *Louisville & Nashville R. R. Co. v. Eubank*, 184 U. S. 27. The state court had construed this provision as embracing a long haul, from a place outside to one within the State, and a shorter haul on the same line and in the same direction between points within the State. This court held that, so construed, the provision was invalid as being a regulation of interstate commerce because "it linked the interstate rate to the rate for the shorter haul and thus the interstate charge was directly controlled by the state law." See 230 U. S. 428, 429. It is for Congress to supply the needed correction where the relation between intrastate and interstate

rates present the evil to be corrected, and this it may do completely by reason of its control over the interstate carrier in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce.

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"It is also clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to the interstate rates. Congress is entitled to maintain its own standard as to these rates and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes.

"Having this power, Congress could provide for its execution through the aid of a subordinate body; and we conclude that the order of the Commission now in question can not be held invalid upon the ground that it exceeded the authority which Congress could lawfully confer."

"In *American Express Co. v. Caldwell*, 244 U. S., 617, and *Illinois Central R. R. Co. v. Public Utilities Comm.*, 245 U. S., 493, the principles announced in the *Shreveport case, supra*, were reaffirmed, but it was also held that in each such case our order must have a definite field of operation and not leave uncertain the territory or points to which it applies.

"The State authorities contend that paragraph 4, section 13, of the act is merely a restatement of the effect of section 3 of the act as interpreted by the Supreme Court in the *Shreveport Case, supra*. The provision in question reiterates in effect what is stated in section 3, but in it Congress has gone further than declaring that there shall be no undue or unreasonable advantage, preference or prejudice as between persons and localities, as in section 3, and has forbidden and declared unlawful 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce.' The term 'commerce' covers the entire field of transportation—the traffic itself and all the instrumentalities and means of carrying it on. The language used is certainly broad enough to cover every discrimination growing out of the relation between intrastate and interstate commerce which injuriously affects the latter.

"Legislatures do not enact laws for the purpose of construing a previous act unless a construction has been placed upon the prior act which was not intended by the legislature. There is certainly nothing in paragraph 4 of section 13 which indicates any purpose of construing section 3 of the act.

"The Supreme Court, in the *Minnesota Rate Cases*, 230 U. S. 352, recognizes the power of the federal government to supervise the rates of intrastate commerce when they are so intermingled with interstate commerce on roads engaged in both that in the interest of interstate commerce such regulation becomes necessary. In that case the court said, page 432:

"The interblending of operations in the conduct of interstate and local business by interstate carriers is strongly pressed upon our attention. It is urged that the same right-of-way, terminals, rails, bridges, and stations are provided for both classes of traffic; that the proportion of each sort of business varies from year to year and, indeed, from day to day; that no division of the plant, no apportionment of it between interstate and local traffic, can be made to-day, which will hold to-morrow; that terminals, facilities, and connections in one State aid the carrier's entire business and are an element of value with respect to the whole property and the business of other States; that securities are issued against the entire line of the carrier and can not be divided by States; that tariffs should be made with a view to all the traffic of the road and should be fair as between through and short-haul business; and that, in substance, no regulation of rates can be just which does not take into consideration the whole field of the carrier's operations, irrespective of state lines. The force of these contentions is emphasized in these cases, and in others of like nature, by the extreme difficulty and intricacy of the calculations which must be made in the effort to establish a segregation of intrastate business for the purpose of determining the return to which the carrier is properly entitled therefrom.

"But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply. It is the function of this court to interpret and supply the law already enacted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor, in the absence of Federal action, may we deny effect to the laws of the State enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power."

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"The terms of the act are sufficiently broad to forbid unjust discrimination against interstate commerce without reference to particular persons or localities.

Considering the conditions existing at the time of the passage of the act, the purpose of the act to correct those conditions, and the legislative scheme adopted by Congress to carry out that purpose, we have no doubt that Congress meant to give full import to the language used, and that the prohibition against 'undue, unreasonable, or unjust discrimination against interstate or foreign commerce' is not limited to particular persons or localities, but is applicable to such discrimination against interstate or foreign commerce in their broad definitions.

"This construction of the act can not be said to be an encroachment on states' rights. The power to regulate interstate commerce was granted Congress chiefly as a means of protection against commercial hostilities and reprisals between the various states which overwhelmed the Confederation and threatened the commercial destruction of some of the states. The existence of that exclusive power in Congress is of greater importance now than at the time of the adoption of the constitution, for the protection of the states themselves. Today railroads run the length and breadth of the country. Many of the roads traverse with their own lines a number of states. Even though a carrier's rails may be confined wholly within a state, it is ordinarily an important link in the transportation of commerce from and to other states. Each state, therefore, is vitally interested in the transportation conditions in the other. A narrow or selfish policy with respect to the transportation instrumentalities within a state may cripple or suppress the commerce of the other states.

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"We find that there are no conditions within Illinois justifying maintenance of lower intrastate passenger fares therein than the fares applicable to the interstate transportation of passengers to, from or through the state; and that the maintenance of such intrastate fares lower than the just and reasonable interstate fares and charges established by the carriers pursuant to Ex Parte 74 gives an undue preference and advantage to persons traveling in intrastate commerce in Illinois and subjects persons traveling in interstate commerce to, from or through the state to undue prejudice and disadvantage, and unjustly discriminates against interstate commerce; which undue prejudice and unjust discrimination should be removed.

"We are of opinion and further find that, to remove the undue prejudice and unjust discrimination found to exist, the present fares for the intrastate transportation of passengers in Illinois should be increased in amounts which shall correspond with the increases heretofore made as aforesaid in interstate passenger fares; and that surcharges upon the contemporaneous charges for space occupied by passengers traveling in intrastate commerce in sleeping cars and parlor cars in Illinois, amounting to 50 per cent of such charges, should be established, such surcharges to accrue to the rail lines."

The following proceedings before the Interstate Commerce Commission involve the intrastate rates and charges of the several states: ARIZONA—In the Matter of Rates, Fares, and Charges Applicable between Points in the State of Arizona (1921), 61 I. C. C. Rep. 572; ARKANSAS—In the Matter of Rates, Fares and Charges of the Missouri P. Ry. Co. and other Carriers in the State of Arkansas (1920), 59 I. C. C. Rep. 471; FLORIDA—In the Matter of Intrastate Rates, Fares, and Charges of the Atlantic C. L. Rd. Co. and other Carriers in the State of Florida (1921), 60 I. C. C. Rep. 551; GEORGIA—In the Matter of Intrastate Rates, Fares, and Charges of the Atlanta & W. P. Rd. Co. and other Carriers in the State of Georgia, (1921), 60 I. C. C. Rep. 527; ILLINOIS—In the Matter of Intrastate Rates within the State of Illinois (1920), 59 I. C. C. Rep. 350; In the Matter of Intrastate Rates within the State of Illinois (1921), 60 I. C. C. Rep. 92; In the Matter of Intrastate Rates within the State of Illinois (1922), 66 I. C. C. Rep. 350; INDIANA—In the Matter of Rates, Fares, and Charges applicable between Points in the State of Indiana (1921), 60 I. C. C. Rep. 337; In the Matter of Rates, Fares, and Charges, applicable between Points in the State of Indiana (1921), 64 I. C. C. Rep. 645; KANSAS—In the Matter of Intrastate Rates, Fares, and Charges in the State of Kansas (1921), 62 I. C. C. Rep. 440; In the Matter of Intrastate Rates, Fares, and Charges in the State of Kansas (1921), 64 I. C. C. Rep. 679; LOUISIANA—In the Matter of Intrastate Rates, Fares, and Charges of the Morgan's L. & T. Rd. & S. S. Co. and Other Carriers in the State of Louisiana (1921), 60 I. C. C. Rep. 467; MISSOURI—In the Matter of Intrastate Rates and Charges in the State of Missouri (1921), 64 I. C. C. Rep. 233; MONTANA—In the Matter of Intrastate Rates and Fares of the Chicago, B. & Q. Rd. Co. and Other Carriers in the State of Montana (1921), 60 I. C. C. Rep. 61; In the Matter of Intrastate Rates, and Fares of the Chicago, B. & Q. Rd. Co. and other Carriers in the State of Montana (1921), 61 I. C. C. Rep. 500; NEBRASKA—In the Matter of Intrastate Rates, Fares, and Charges of the Union P. Rd. Co. and other Carriers in the State of Nebraska (1921), 60 I. C. C. Rep. 305; NEVADA—In the Matter of Intrastate Rates, Fares, and Charges of the Southern P. Co. and other Carriers in the State of Nevada (1921), 60 I. C. C. Rep. 623; NEW YORK—In the Matter of Rates, Fares and Charges of the New York Rd. Co. and other Railroad Companies in the State of New York (1920), 59 I. C. C. Rep. 290; Lehigh V. Rd. Co. v. Public Service Commission of New York (1921), 272 Fed. Rep. 758; State of New York v. United States (1922), 66 L. Ed. 244, —U. S. —, —Sup. Ct. Rep. —; NORTH DAKOTA—In the Matter of Intrastate Rates, Fares and Charges of the Chicago, M. & St. P. Ry. Co. and other Carriers in the State of North Dakota (1921), 61 I. C. C. Rep. 504; OHIO—In the Matter of Passenger and Pullman Fares, Charges for excess Baggage, and Rates on Milk and Cream applicable between Points in the State of Ohio (1921), 60 I. C. C. Rep. 78; In the Matter of Rates, Fares and Charges of the Pennsylvania-Ohio Power & Light Company within the States of Ohio and Penn-

sylvania (1921), 64 I. C. C. Rep. 493; In the Matter of Rates, Fares, and Charges of the Steubenville, East Liverpool & Beaver Valley Traction Co. within the States of Ohio and Pennsylvania (1921), 64 I. C. C. Rep. 517; SOUTH CAROLINA—In the Matter of Intrastate Passenger Fares and Charges and Certain Charges for special Services within the State of South Carolina (1921), 60 I. C. C. Rep. 290; TENNESSEE—In the Matter of Intrastate Rates and Charges in the State of Tennessee (1921), 63 I. C. C. Rep. 160; TEXAS—In the Matter of Intrastate Rates within the State of Texas (1921), 60 I. C. C. Rep. 421; In the Matter of Intrastate Rates within the State of Texas (1921), 62 I. C. C. Rep. 591; In the Matter of Intrastate Rates within the State of Texas (1922), 68 I. C. C. Rep. 25; WISCONSIN—In the Matter of Intrastate Passenger Fares on the line of the Chicago & N. W. Ry. Co. and other Carriers between Points in the State of Wisconsin, (1920), 59 I. C. C. Rep. 391; Railroad Commission of Wisconsin v. Chicago, B. & Q. Rd. Co. (1922), 66 L. Ed. 236, — U. S. —, — Sup. Ct. Rep. —.

3. In the Matter of Rates, Fares and Charges of the New York Central Railroad Company and other railroad companies in the State of New York (1920), 59 I. C. C. Rep. 290, *et seq.* The Commission, per Mr. Commissioner Ford, stated:

"In pursuance of our findings in *Ex Parte 74. Increased Rates*, 1920, 58 I. C. C. 220, we authorized within a region that includes the state of New York an increase of 40 per cent in the interstate freight rates; 20 per cent in the interstate passenger fares, baggage charges, and rates on milk and cream; and also a surcharge amounting to 50 per cent of the charge for space in sleeping and parlor cars, to accrue to the rail carriers.

"Thereupon the steam railroad companies serving the state of New York made formal application to the Public Service Commission of the State of New York, Second District, for permission to file effective on five days' notice tariff supplements providing increases in the rates, fares, and charges applicable to intrastate traffic in the state of New York corresponding with those authorized in our report. So far as the application related to rates and charges for the transportation of freight except milk it was granted by the Public Service Commission, by an order entered August 19, 1920, and the increases became effective August 26, 1920, contemporaneously with the increases in interstate rates. But so far as it related to passenger fares, sleeping-car and parlor-car fares, baggage charges, and rates on milk and cream, the application was denied by the Public Service Commission. Thereafter the principal steam railroads serving the state of New York filed with us a petition for relief in accordance with the provisions of section 13 of the interstate commerce act. A hearing upon the petition has been held, and the views of parties in interest have been presented to us on brief and by oral argument.

"This case raises again the question whether in regulating interstate commerce, under authority reposed in us by Congress, we have incidentally the power of regulating intrastate commerce so far as it affects interstate commerce. In the *Shreveport Case*, 23 I. C. C. 31, we held that we did possess that power by act of Congress, and we pointed out:

"'Congress passed this act with full knowledge and profound appreciation of those decisions of the Supreme Court in which it had been held that state commerce was that wholly within a state "and not affecting interstate commerce," as is fully shown by the Cullom report of 1886, out of which grew the act to regulate commerce.'

"The position we took was sustained by the United States Supreme Court, and the principle on which we acted then continues to be our guide. But since then the general obligation resting upon us to exercise control over intrastate commerce so far as it affects interstate commerce has been put in the form of a mandate by section 13 of the interstate commerce act, as amended by the transportation act, 1920.

"It has been urged in opposition to the application of this principle to the pending case that such incidental jurisdiction as we may possess over intrastate rates is contingent upon proof that discrimination exists affecting particular persons or localities. But inasmuch as the basis of our jurisdiction is our power to regulate interstate commerce, it follows that the decisive factor is whether the rates under consideration injuriously affect interstate commerce. It is no answer to say that if this conclusion be admitted it may have the effect of completely displacing state jurisdiction over state commerce. There may be cases in which intrastate rates affect interstate commerce injuriously in ways so manifest as to make them subject to our control. There may be cases in which the connection of intrastate rates with the movement of interstate commerce is so remote and unimportant that we may properly disregard it. But in every case which puts in question intrastate rates, the decisive factor is whether or not they affect interstate commerce injuriously to a considerable extent. If they do they are brought under our jurisdiction and made subject to our control, even although the whole rate structure of a state should be involved.

"It has not happened heretofore that we have had occasion to make such an extensive exercise of our authority as is now contemplated, and we could not be moved to do so save by the most cogent reasons. Such reasons have been supplied by the situation in which the transportation interests of the country were placed and the action taken by Congress to relieve that situation.

"Our findings in *Increased Rates*, 1920, *supra*, were responsive, as the report shows, to legislation enacted by the Congress as part of the transportation act, 1920.

approved February 29, 1920, now incorporated in the interstate commerce act as part of section 15a thereof, paragraph 2 and 3 reading as follows:

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

"(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments of equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account."

"In accordance with these statutory provisions we designated four rate groups, one of which embraces the territory bounded on the west by the Mississippi River and on the south by the Ohio River and the main line of the Norfolk & Western Railway; and we authorized increased rates, fares, and charges that were designed to enable the carriers as a whole in that group, 'under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment,' to earn an aggregate annual net railway operating income equal, as nearly as may be, to 5½ per cent upon the aggregate value of the railway property of such carriers in that group, plus one-half of 1 per cent of that aggregate value for improvements, betterments, or equipment, chargeable to capital account.

"Congress has taken, as the basis for determining a fair return for the railroads, the aggregate value of the railway properties in each group held for and used in the service of transportation. In making a tentative finding of the value of the railway properties in each group, for the purpose of our report, we included all the railway property of each carrier held for and used in the service of transportation. This should not be construed as holding that jurisdiction over intrastate rates and fares has been taken away from the states and reposed in us. We find nothing in the law to indicate that such was the intent of Congress. But Congress has directed that we allow rates that will yield in the aggregate a return of 5½ or 6 per cent upon the value of the railway property in each of the groups. There can be no doubt of the power of Congress to devise and provide for carrying into effect a plan for assuring to the nation's interstate railroads a fair return upon the value of their property; and the full control by Congress of this matter is not to be denied on the ground that the carrier's aggregate earnings are a commingling of intrastate revenue. In *The Minnesota Rate Cases*, 230 U. S., 399, the Supreme Court said:

"This reservation to the State manifestly is only of that authority which is consistent with and not opposed to the grant of Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

"The record shows that the refusal of the state of New York to permit the carriers to increase the rates and fares here in controversy to the extent approved by us is costing the railroads between \$11,000,000 and \$12,000,000 annually. In other words, the annual earnings of the interstate carriers operating in New York are now between \$11,000,000 and \$12,000,000 less than they would be if the general level of rates and fares approved by us had become effective on intrastate traffic; and to that extent the declared purpose of Congress is defeated by a preferential basis of rates and fares maintained by authority of the state of New York.

"This proceeding presents a practical question which we have endeavored to deal with in a practical way. The needs of these interstate carriers for revenue to enable them to provide adequate transportation service and facilities are immediate and, in the interest of the public, can not be permitted to await the consideration in detail of individual fares, charges and rates. The record shows that the respondent carriers

perform the services here in question under substantially similar circumstances and conditions, whether in respect of interstate or intrastate transportation; and that the lower basis of intrastate fares, charges, and rates results in undue prejudice against interstate passengers and shippers and unjust discrimination against interstate commerce. The present record warrants the finding hereinafter made. Those findings are without prejudice to the right of the authorities of the state of New York or of any other interested party, to apply in the proper manner for a modification of our findings and order as to any fares, charges, or rates in such a way as to contravene the provisions of the interstate commerce act.

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"Subject to the above reservation in the matter of commutation fares and commutation baggage charges, we are of the opinion and find that the increases made by the carriers under Ex Parte 74, relating to passenger fares and baggage charges, and now in effect, result in reasonable passenger fares and baggage charges for interstate transportation within the territory involved in this proceeding, and that the failure of the carriers within the state of New York to increase the standard intrastate fares and charges correspondingly has resulted in the past and will result in the future: In intrastate fares and charges lower than the corresponding interstate fares and charges; in undue prejudice to persons traveling in interstate commerce within the state of New York and between points in the state of New York and points in other states; in undue preference and advantage to persons traveling intrastate in New York, and in unjust discrimination against interstate commerce.

"We further find that said undue prejudice and unjust discrimination should be removed by making increases in said intrastate passenger fares and baggage charges which shall correspond with the increases heretofore made as aforesaid in interstate passenger fares and baggage charges.

"We further find that the increases made by the carriers under Ex Parte 74, relating to space occupied by passengers in sleeping and parlor cars, result in reasonable charges for the occupancy of such space by passengers traveling in interstate commerce in the territory involved in this proceeding, and that the failure of the carriers within the state of New York to increase correspondingly the charges for like space for passengers traveling in intrastate commerce has resulted in the past and will result in the future: In intrastate charges lower than the corresponding interstate charges; in undue prejudice to persons traveling in interstate commerce within the state of New York and between points in the state of New York and points in other states; in undue preference and advantage to persons traveling intrastate in New York, and in unjust discrimination against interstate commerce.

"We further find that said undue prejudice and unjust discrimination should be removed by making increases in said intrastate charges which shall correspond with the increases heretofore made as aforesaid in interstate charges.

"We further find that the increases made by the carriers under Ex Parte 74, relating to rates on milk and cream, and now in effect, result in reasonable rates on milk and cream for interstate transportation within the territory involved in this proceeding, and that the failure of the carriers within the state of New York to increase the intrastate rates on milk and cream correspondingly has resulted in the past and will result in the future: In intrastate rates lower than the corresponding interstate rates; in undue prejudice to shippers of milk and cream in interstate commerce within the state of New York and between points in the state of New York and points in other states; in undue preference and advantage to shippers of milk and cream in intrastate commerce in New York, and in unjust discrimination against interstate commerce.

"We further find that said undue prejudice and unjust discrimination should be removed by making increase in said intrastate rates on milk and cream which shall correspond with the increases heretofore made as aforesaid in the rates on milk and cream shipped in interstate commerce.

"We further find that, whether the aforesaid passenger fares, baggage charges, surcharges, or rates on milk and cream pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services, in each instance, are performed by the carriers under substantially similar circumstances and conditions."

In the New York case Mr. Commissioner Eastman rendered the following able dissenting opinion (59 I. C. C. Rep. 290, 300, et seq.):

"I am unable to join in the decision of the majority, because I believe it goes beyond our lawful power. The objection is more than technical, for it concerns the basic relations between the state and federal governments, a matter of great moment.

"In essence, the carriers' position is that when we authorize an increase in interstate rates under section 15 (a) of the interstate commerce act a corresponding increase must be made in intrastate rates; otherwise unjust discrimination against interstate commerce results, which it is our duty under section 13 to correct. State commissions may be asked to authorize intrastate increases but they need be offered no evidence except the fact of our decision and have no real discretion. The carriers accept the logical consequence of this view and I understand them correctly, by holding that applications to the state commissions are in substance a matter of courtesy and that we could, under section 13, either upon complaint or upon our own motion

prescribe the intrastate rates desired even though no such application had been made. If this be so it follows that we would practically at will deprive any and all of the states of authority over intrastate rates, for when such rates are once prescribed by our order under section 13 they cannot thereafter be changed without our consent.

"The record in the instant case is based upon and conforms to the general theory of our power, and it is the only theory it seems to me, upon which the majority of the Commission can in full measure be supported. I am unable to believe that it is sound. The Supreme Court of the United States has said:

"In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution, the rule is that it should never be held that the Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless and except so far as its purpose to do so is clearly manifested." (*Illinois C. R. R. v. Public Utilities Commission*, 245 U. S. 493, 510.)

"It is in the light of this wise and salutary rule that we should approach the issue before us, construing the provisions of the Act with scrupulous respect for State authority. It is, I think, our duty to include that when the Congress expects us to exercise new powers at the expense of a State, we shall be told to do so in plain and unmistakable terms.

"In defining our jurisdiction, at the very beginning of the Interstate Commerce Act, paragraph 2 of section 1, states that the provisions of the Act shall not apply—

"To the transportation of passengers or property, or to receiving, delivering, storage or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any place in the United States as aforesaid."

"The language is unequivocal and there is no subsequent provision which runs counter to the limitation. It is interstate and not intrastate transportation with which the Act has to do. Under paragraph 4 of section 13 it is true that we may prescribe intrastate rates, but only for the purpose of removing unjust discrimination against interstate commerce. Plainly this power springs from and is merely an incident of the duty to regulate and protect interstate traffic.

"Turning to section 15 (a), our duty to establish rates which will enable carriers to earn a fair return upon the aggregate value of the railway property relates and is confined to *interstate* rates. Without regard to the limitation of section 1, there is no 'clearly manifested purpose' to extend our authority over intrastate rates, and certainly there is none in view of this limitation. Nor is such a conclusion inconsistent with a reasonable interpretation and practical application of this section. A rule is laid down for our guidance, but our duty is confined to interstate rates and it is a duty merely to maintain such rates at the level which will yield the return desired, assuming that the states will exercise their own power justly and taking into consideration our right to correct intrastate rates which unjustly discriminate against interstate commerce.

"At this point we may consider for a moment whether or not there is reason to believe that the Public Service Commission of New York is disposed to deal justly with the carriers. Following our decision in *Increased Rates*, 1920, *supra*, applications were filed with that Commission for authority to make like increases in intrastate rates, fares and charges. With a few minor exceptions the freight increases sought were permitted at once to become effective, as was possible under the state statutes, without indication of approval or disapproval and subject to complaint or investigation in the future. The situation was different as to passenger fares. By a provision of the New York law these are limited to a maximum of 3 cents per mile, but the state commission pointed out that it could permit fares in excess of this limit upon a showing that existing fares were insufficient to afford reasonable compensation for the service rendered. Notwithstanding this intimation the carriers offered no evidence that did not assert that the fares were insufficient, but relied upon the fact that we had permitted an increase of 20 per cent in the interstate fares. Under the circumstances no course seemed open to the New York commission except to deny the application, and this it did upon the sole ground of lack of evidence.

"There is no basis for a belief that the New York commission is disposed to deal other than justly with the carriers, or that it would have been unduly exacting if they had undertaken to show insufficiency of compensation. Upon the facts before us and in a spirit of comity the carriers might well be remitted to the state tribunal to exhaust their remedies before coming to us for action which will deprive the state of all authority over intrastate fares so long as our order remains in effect. In this view of the matter whatever losses in revenue the carriers may have suffered are chargeable to their own default.

"But approaching the matter solely from the viewpoint of our own jurisdiction, it is clear, I think, that for such authority as we possess over intrastate rates we must now look to the provisions of section 13. The question at once arises whether by reason of this section we have an essentially different issue before us than has frequently been considered under section 3 of the act to regulate commerce in so-called 'Shreveport cases.' The carriers assert that the issue is different because section 13 not only prohibits 'any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand,' but also prohibits 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce.' Their view, as I understand it, is that the word 'discrimination' is this latter phrase is equivalent to the word 'burden,' and that the effect is to prohibit what was not pro-

hibited by section 3, namely, an unduly low level of rates within the state which is yet not alleged or shown to be unduly preferential of or unduly prejudicial against any particular person or community.

"This conclusion I find it difficult to accept. Upon protest the conference committee of the Senate and House of Representatives struck from section 13 the words 'undue burden' and wrote in their place the words 'undue, unreasonable, or unjust discrimination,' which now are there. I hesitate to believe, as the carriers urge that no change in meaning was intended or accomplished by this change in words. Moreover, in speaking of section 3 of the act to regulate commerce in the consideration of the original *Shreveport Case*, the Supreme Court of the United States said:

"It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach." (*Houston East & West Texas Ry. Co. v. United States*, 234 U. S. 342, 356.)

"Surely this language is quite as broad as the words in section 13 to which our attention is now directed.

If the issue before us is not essentially different from the issue which has been considered in prior 'Shreveport Cases,' it will, I think, be conceded that while the evidence may be sufficient to justify action against certain intrastate fares and charges, it is not sufficient to justify the all-embracing action which the majority approve. This is indicated by the fact that the carriers have not seen fit to rely upon preference to persons or communities, none of which are complaining, but have rested their case chiefly upon the allegation that the intrastate rates are upon a lower level than the interstate and fail to contribute their fair share of the railway operating income to which we have found that the carriers in the eastern group are entitled. For the reasons above stated I doubt our power to change state rates upon this ground. It falls nothing short of an appellate power to substitute our judgment as to the reasonableness of such rates for the judgment of the states. But assuming that we possess this power, is the evidence sufficient to justify us in exercising it?

"Stating the question differently, is there evidence that the intrastate fares and charges in question are not producing their fair share of railway operating income and, if they are not, that the percentage increase desired is necessary to bring them to the proper level. That is not, it seems to me, an inevitable conclusion from our decision in *Increased Rates*, 1920, *supra*, and in this connection it is desirable to understand clearly the purport and effect of that decision. We were there faced with the necessity of providing without delay the additional revenue needed to bring the aggregate income of the carriers to the level prescribed by the act, and we adopted the expedient of authorizing horizontal percentage increases in rates, fares, and charges within and between certain territorial groups. This expedient was necessary, for any detailed consideration of individual rates was impracticable in the time available. Nevertheless, it should be noted that the act does not prescribe this method of increasing rates, that our duty under section 15 (a) is a continuing duty, and that our finding was only that the method employed would 'result in rates not unreasonable in the aggregate.' It rested upon the assumption that extensive readjustment would probably be necessary. It is not equivalent to a finding that individual rates, fares, and charges or classes of rates, fares, and charges, so increased and now in effect, are just and reasonable. Still less does it follow as a necessary conclusion, where state authority is involved, that the passenger fares within any particular state must be increased 20 per cent in order to produce their fair share of railway operating income. But if our decision in *Increased Rates*, 1920, is not evidence of that fact, certainly there is no other evidence of record upon which such a conclusion can be based.

"No doubt it may be unnecessary that the individual fares and charges within the state should all be considered separately or that the value of the property used in the intrastate transportation should be established and the return now earned upon that value estimated by elaborate computations. But I am unable to escape the conclusion that even if the theory of the carriers as to our power under section 13 be accepted, at least it should be shown, by evidence sufficient to justify a valid opinion, that the intrastate fares and charges in question are not now furnishing adequate compensation for the service rendered judged by the standard which the Congress has set forth, and that an increase of 20 per cent is necessary to this end.

"Summing the matter up, without going into further detail, I am of the opinion that upon the record before us the decision of the majority involves the exercise of a power which goes beyond and 'clearly manifested purpose' of the Congress, and which we ought not to attempt to exercise until it is conferred upon us in plain and unmistakable terms. Nor would such a conclusion leave the carriers without a remedy, if they are prepared to bring the necessary evidence to the attention of the New York commission."

4. In the Matter of Intrastate Rates within the State of Illinois (1920), 59 I. C. C. Rep. 350.
5. Railroad Commission of Wisconsin v. Chicago, B. & Q. Rd. Co. (1922), 66 L. Ed. 236, et seq. — U. S. —, — Sup. Ct. Rep. —.
6. State of New York, et al., v. United States, et al. (1922), 66 L. Ed. 244, et seq. — U. S. —, — Sup. Ct. Rep. —, affirming judgment in the Circuit Court of Appeals in Lehigh V. Rd. Co. v. Public Service Commission of New York (1921), 272 Fed. Rep. 758.

**613-OO. TRANSPORTATION OF COMMISSION'S VALUATION SUPPLIES.**

It shall be the duty of every common carrier by railroad whose property is being valued under the Act of March first, nineteen hundred and thirteen, to transport the engineers, field parties, and other employees of the United States who are actually engaged in making surveys and other examinations of the physical property of said carrier necessary to execute said Act from point to point on said railroad as may be reasonably required by them in the actual discharge of their duties; and, also, to move from point to point and store at such points as may be reasonably required the cars of the United States which are being used to house and maintain said employees; and, also, to carry the supplies necessary to maintain said employees and the other property of the United States actually used on said railroad in said work of valuation. The service above required shall be regarded as a special service and shall be rendered under such forms and regulations and for such reasonable compensation as may be prescribed by the Interstate Commerce Commission and as will insure an accurate record and account of the service rendered by the railroad, and such evidence of transportation, bills of lading, and so forth, shall be furnished to the Commission as may from time to time be required by the Commission.<sup>1</sup>

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1. Provision in Sundry Civil Appropriations Act (August 1, 1914).

**613-PP. POWER OF COMMISSION OVER INTRASTATE RATES DURING THE PERIOD OF FEDERAL CONTROL.**

Section 10 of the *Federal Control Act*<sup>1</sup> reads as follows:

That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any Act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control.

That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the Commission pending final determination.

Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coordinated national control and not in competition.

After full hearing the Commission may make such findings and orders as are authorized by the Act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said Act: *Provided, however,* That when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make.

Under Section 10 of the Federal Control Act, the jurisdiction of the Interstate Commerce Commission over intrastate rates is limited to determining the justness and reasonableness of such rates during the period of Federal control.<sup>2</sup>

By Section 10 of the Federal Control Act the duty of determining the justness and reasonableness of rates so initiated is laid upon the Interstate Commerce Commission.<sup>3</sup>

By Section 10 of the Federal Control Act the authority to determine upon complaint the justness and reasonableness of such rates and to award reparation on shipments moving thereunder is vested in the Interstate Commerce Commission.<sup>4</sup>

In *State of New York, Commissioner of Highways v. Director General, West Shore Rd. Co.*<sup>5</sup> the Commission stated: "While complainant asks for reparation on certain shipments which moved prior to June 25, 1918, the date rates in accord with General Order No. 28 of the Director General of Railroads became effective, the rates charged on such shipments made were not initiated by the President within the meaning of the Federal control act, and we are without jurisdiction to consider them. *Solvay Process Co. v. D. L. & W. R. R. Co.*, 55 I. C. C. 280."

The jurisdiction of the Interstate Commerce Commission over intrastate rates, except under certain circumstances, terminated with the relinquishment of the carriers from Federal control.<sup>6</sup>

The period of Federal control of common carriers terminated on March 1, 1920.<sup>7</sup>

1. Federal Control Act: An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes, approved March 21, 1918, (40 Stat. L. 451), as amended by an Act approved March 2, 1919, (40 Stat. L. 1209).
2. Alden Coal Co. v. Rock Island S. Ry. Co. (1920), 50 I. C. C. Rep. 223, 225.
3. Solvay Process Co. v. Delaware L. & W. Rd. Co. (1919), 55 I. C. C. Rep. 280, 281.
4. Swift & Co. v. Director General (1919), 55 I. C. C. Rep. 324, 326, citing, Solvay Process Co. v. Delaware L. & W. Rd. Co., *supra*; Voldt Paper Mills v. Director General (1919), 55 I. C. C. Rep. 331, citing, Solvay Process Co. v. Delaware, L. & W. Rd. Co., *supra*.
5. State of New York, Commissioner of Highways, v. Director General, West Shore Rd. Co. (1919), 55 I. C. C. Rep. 619, 620.
6. Western Lime & Cement Co. v. Director General, as Agent, Chicago, B. & Q. Rd. Co. (1920), 58 I. C. C. Rep. 508, 509.
7. Transportation Act, 1920, Section 200 (a); Miller v. Director General, as Agent, Northern P. Ry. Co. (1921), 60 I. C. C. Rep. 162, 165.

#### 613-QQ. POWER OF INTERSTATE COMMERCE COMMISSION OVER RATES AND CHARGES AFTER TERMINATION OF FEDERAL CONTROL AND PRIOR TO SEPTEMBER 1, 1920. INTRASTATE AND INTERSTATE RATES.

Section 208 (2) of the *Transportation Act*<sup>1</sup> provides as follows:

All rates, fares, and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare, or charge, unless such reduction or change is approved by the Commission.

1. Transportation Act, 1920, Section 208 (a).

**614. Classification of freight and freight classifications.**

See *"Classification of Freight and Freight Classifications," Chapter 5, ante.*

**615. Fourth section of the Interstate Commerce Act—Long-and-short-haul clause—Fourth-section applications.**

See *"Fourth Section of the Interstate Commerce Act—Long-and-Short-Haul Clause—Fourth-Section Applications," Chapter 7, post.*

**616. Weights and weighing.**

See *"Weights and Weighing," Chapter 9, post.*

**617. Routes and routing.**

See *"Routes and Routing," Chapter 11, post.*

**618. Protective services in transportation of perishable traffic.**

See *"Protective Services in Transportation of Perishable Traffic," Chapter 12, post.*

**619. Transit privileges, facilities and regulations.**

See *"Transit Privileges, Facilities and Regulations," Chapter 13, post.*

**620. Elevation.**

See *"Elevation," Chapter 14, post.*

**621. Contracts between shippers and carriers concerning transportation charges.**

See *"Contracts between Carriers and Shippers and Others," Chapter 15, post.*

**622. Terminal facilities and regulations.**

See *"Terminal Facilities and Regulations," Chapter 16, post.*

**623. Demurrage or "car-service" and detention charges.**

See *"Demurrage or 'Car-Service' and Detention Charges," Chapter 17, post.*

**624. Limitation of common carrier's liability—Initial carrier's liability.**

See *"Limitation of Carrier's Liability—Initial Carrier's Liability," Chapter 20 post.*

**625. Free and reduced-rate transportation of property.**

See "*Free and Reduced-Rate Transportation of Property*," Chapter 21, post.

**626. Allowances by carriers to owners of transported property.**

See "*Allowances by Carriers to Owners of Transported Property*," Chapter 22, post.

**627. Allowances to terminal railroads and boat lines owned or controlled by shippers.**

See "*Allowances to Terminal Railroads or Boat Lines Owned or Controlled by Shippers*," Chapter 23, post.

**628. Switching—Switch connections—Private side-tracks.**

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**631. Damages and reparation—Claims between shippers and carriers.**

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**632. Railroad company freight tariffs or rate schedules.**

See "*Railroad Company Freight Tariffs or Rate Schedules*," Chapter 30, post.

**633. Publication, posting and filing of freight rates and charges.**

See "*Railroad Company Freight Tariffs or Rate Schedules*," Chapter 30, post.

**634. Transportation of live stock.**

See "*Transportation of Live Stock*," Chapter 31, post.

**635. Express companies and express traffic.**

See "*Express Companies and Express Traffic*," Chapter 41, post.

**636. Express company freight tariffs or rate schedules.**

See "*Express Company Freight Tariffs or Rate Schedules*," Chapter 42, post.

**637. Practice and procedure before the Interstate Commerce Commission.**

See "*Practice and Procedure before the Interstate Commerce Commission*," Chapter 46, post.

**638. Civil proceedings in the Courts.**

See "*Civil Proceedings in the Courts*," Chapter 47, post.

**639. Water carriers—Panama Canal Act.**

See "*Water Carriers—Panama Canal Act*," Chapter 50, post.

**640. Telegraph, telephone, cable and radiotelegraph companies.**

See "*Telegraph, Telephone, Cable and Radiotelegraph Companies*," Chapter 51, post.

**641. Penalties and forfeitures—Criminal proceedings.**

See "*Penalties and Forfeitures—Criminal Proceedings*," Chapter 52, post.

**642. Federal control of common carriers—United States Railroad Administration**

See "*Federal Control of Common Carriers—United States Railroad Administration*," Chapter 54, post.

**643. Railway finances—Guaranteed return on railway property.**

See "*Railway Finances—Guaranteed Return on Railway Property*," Chapter 55, post.

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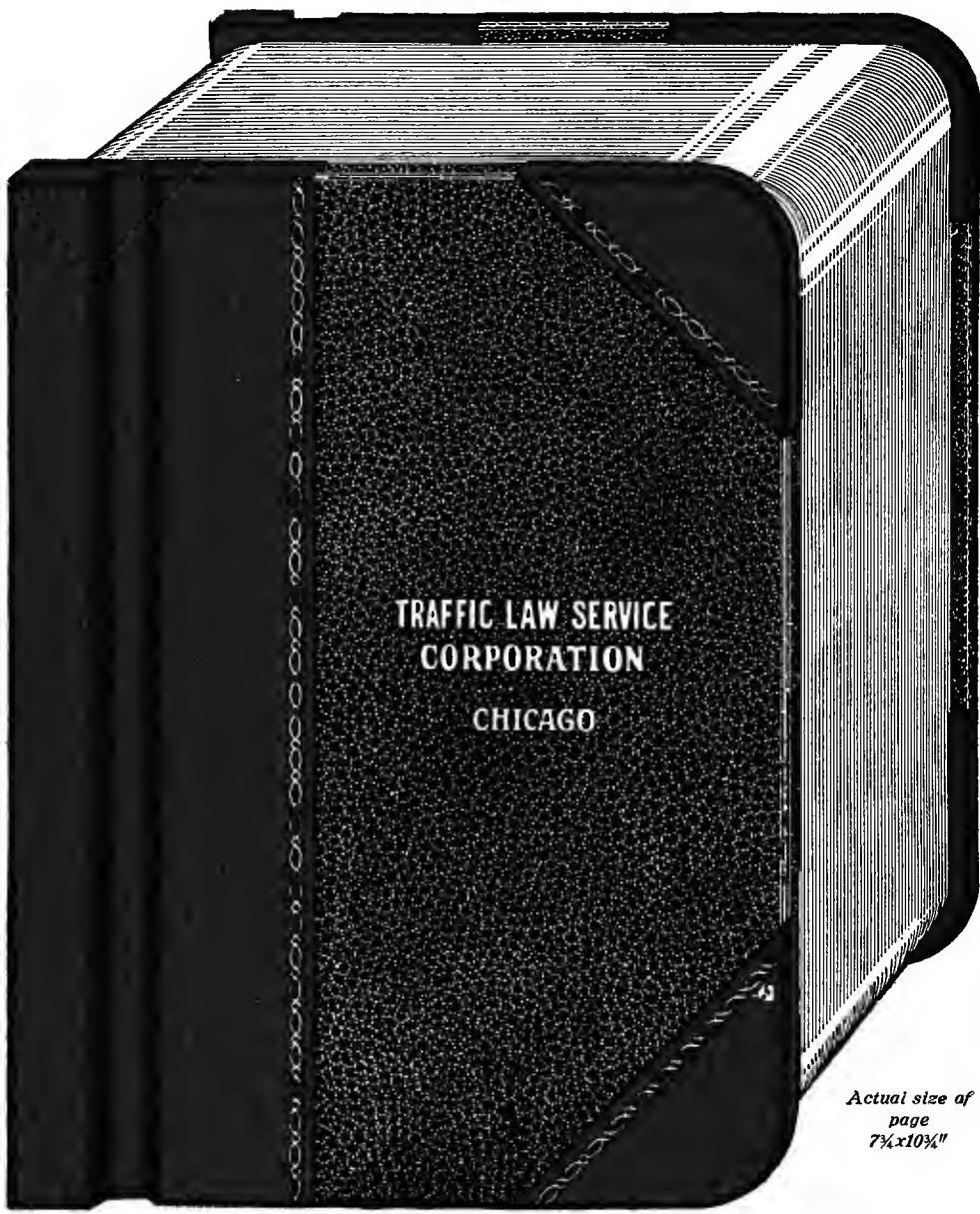
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